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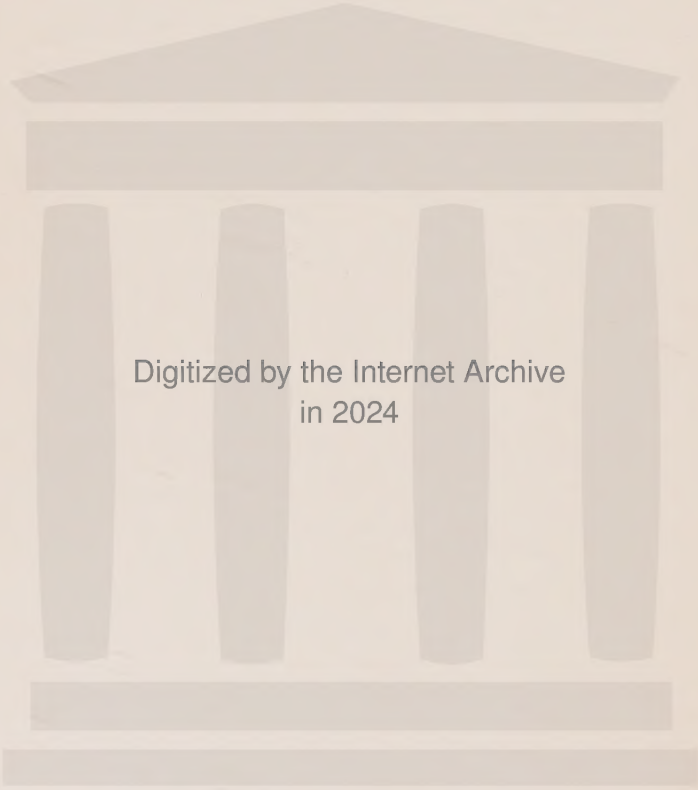
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THE LAW REPORTS

[1915] Appeal Cases

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1915.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

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Privy Council	ARTHUR M. TALBOT,	*Barrister-at-Law.*

1915.

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JUDGES AND LAW OFFICERS.

MEMORANDA.

1915.

Jan. 17. The Right Honourable Sir William Rann Kennedy, *one of the Lords Justices of Appeal, died suddenly at his residence, Phillimore Gardens, Kensington, at the age of* 68.

Jan. 23. Sir John Eldon Bankes, *one of the Justices of the High Court, was appointed a Lord Justice of Appeal, and was afterwards sworn of the Privy Council and took his place at the Board accordingly.*

Jan. 25. Sir Frederick Low, K.C., *was appointed one of the Justices of the High Court of Justice.*

April 13. The Right Honourable Sir Henry Burton Buckley, *having resigned his office as one of the Lords Justices of Appeal, was created a Baron of the United Kingdom by the name of* Baron Wrenbury of Old Castle, *in the county of Sussex; and* Sir Thomas Rolls Warrington, *one of the Justices of the High Court of Justice, was appointed one of the Lords Justices of Appeal. On the same day* Robert Younger, K.C., *was appointed one of the Justices of the High Court of Justice. He was afterwards knighted.*

April 29. Sir Thomas Rolls Warrington, *Lord Justice of Appeal, was sworn of the Privy Council and took his seat at the Board accordingly.*

May 27. The Right Honourable Viscount Haldane, *having resigned his office as Lord Chancellor of Great Britain,* Sir Stanley Owen Buckmaster, *Solicitor-General, was sworn of the Privy Council. The Great Seal was on the same day delivered to him, and having been sworn of the Privy Council, he took his place at the Board accordingly.*

May 31. The Right Honourable Sir Edward Henry Carson, K.C., *was appointed Attorney-General in place of* Sir John Allsebrook Simon, *who had resigned his office.*

June 3. The Right Honourable Frederick Edwin Smith, K.C., *was appointed Solicitor-General. He was afterwards knighted.*

June 14. The Right Honourable Sir Stanley Owen Buckmaster, *Lord Chancellor, was created a Baron of the United Kingdom by the name of* Baron Buckmaster of Cheddington, *in the county of Buckingham.*

Sept. 30. The Right Honourable Sir George Farwell, *formerly a Lord Justice of the Court of Appeal, died at his residence, Knowle, Dunster, in his 70th year.*

Oct. 4. The Right Honourable Sir T. Bucknill, *formerly one of the Justices of the High Court of Justice, died at his residence, Woodcote Lodge, Epsom, at the age of* 70.

1915.

Nov. 8. The Right Honourable Sir E. H. Carson *having resigned his office of Attorney-General,* The Right Honourable Sir Frederick Edwin Smith, K.C., *was appointed Attorney-General, and* The Right Honourable George Cave, K.C., *who had been previously sworn of the Privy Council, was appointed Solicitor-General, and was afterwards knighted.*

Nov. 23. The Honourable Sir Matthew Ingle Joyce, *having resigned his office as one of the Justices of the High Court of Justice,* Arthur Frederic Peterson, K.C., *was appointed his successor, and was afterwards knighted.*

Dec. 15. The Right Honourable Viscount Alverstone, *formerly Lord Chief Justice of England, died at his residence, Winterfold, Cranleigh, Surrey, in his 73rd year.*

ERRATA.

Page	*Line*	*For*	*Read*
518	1	*Candlish Henderson*	*W. Finlay, K.C.,* -and *Candlish Henderson.*
584	1	Pring, Gavan Duffy, and Powers JJ.	Pring, Sly, and Gordon JJ.
735	footnote (1)	L. R. 1 Sc. & D.	L. R. 1 H. L. Sc.
738	,, (1)		
742	,, (6)	L. R. 2 Sc. & D.	L. R. 2 H. L. Sc.
760	,, (1)	1 Y. & C.	1 Y. & C. Ex.
885	line 2 of text, after "Divisional Court" add footnote [1913] 3 K. B. 427.		
1080	footnote (2)	1915	1815.

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LIST

OF THE

JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HIS MAJESTY IN COUNCIL.

1915.

Viscount *Haldane*, Lord Chancellor.
Lord *Buckmaster*, Lord Chancellor.
Earl of *Halsbury*.
Earl *Loreburn*.
Lord *Dunedin*.
Lord *Atkinson*.
Lord *Shaw of Dunfermline*.
Lord *Mersey*.
Lord *Moulton*.
Lord *Parker of Waddington*.
Lord *Sumner*.
Lord *Parmoor*.
Lord *Wrenbury*.
*Sir *George Farwell*.
Sir *Arthur Channell*.
Sir *Samuel Way*, Bart.
Sir *Samuel Griffith*, G.C.M.G.
Sir *Edmund Barton*, G.C.M.G.
Sir *John Edge*.
Sir *Charles Fitzpatrick*, G.C.M.G.
Sir *Joshua Williams*.
Sir *James Rose-Innes*, K.C.M.G.
Syed *Ameer Ali*, C.I.E.

And those other members of the Privy Council who are within the provisions of the statutes 3 *&* 4 *Will.* 4, *c.* 41, 44 *Vict. c.* 3, *and* 50 *&* 51 *Vict. c.* 70.

* Died Sept. 30, 1915.

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

COYLE OR BROWN . . . . . APPELLANT;

AND

JOHN WATSON, LIMITED . . . . . RESPONDENTS.

H. L. (Sc.)*
1914
April 28.

Employer and Workman—Compensation—Accident arising out of and in the Course of Employment—Disease—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

Upon an application for compensation by the widow of a miner the arbitrator found that, owing to a wreck in the shaft of No. 2 pit where the deceased was working, the deceased and his fellow workers were ordered to ascend to the surface by the shaft of No. 1 pit, this being the downcast shaft for the air current which ventilated the mine; that they were kept waiting at a mid-landing for an hour and a half until the men who usually ascended by this shaft had been raised, and were exposed to a cold down draught; that as the result of this exposure

---

* *Present:* LORD KINNEAR, LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

H. L. (Sc.)
1914
COYLE OR BROWN v. JOHN WATSON, LIMITED.

the deceased caught a chill which brought on pneumonia from which he died :—

Held, that the death resulted from the exposure consequent on the wreck in shaft No. 2 and that there was evidence to support the finding of the arbitrator that the deceased sustained an injury by accident arising out of and in the course of his employment.

Drylie v. *Alloa Coal Co.*, 1913 S. C. 549, approved.

Victorian Railways Commissioners v. *Coultas* (1888) 13 App. Cas. 222 discussed.

Decision of the Second Division of the Court of Session in Scotland (1913) 1 S. L. T. 174 reversed.

APPEAL from a decision of the Second Division of the Court of Session in Scotland under the Workmen's Compensation Act upon a case stated by the sheriff-substitute of Lanarkshire. (1)

The appellant, the widow of John Brown, miner, on behalf of herself and the pupil children of the marriage, claimed compensation from the respondents in respect of the death of her husband.

On June 26, 1911, Brown, who was employed by the respondents in No. 2 pit, Gilbertfield Colliery, started work as usual about 7 o'clock A.M. and seemed to be in his usual good health. Between 8 and 9 o'clock A.M., in consequence of a wreck in the shaft, all the men in No. 2 pit were ordered to ascend to the surface. Brown and his fellow workers proceeded towards the shaft of No. 2 pit by which they were usually raised to the surface. Under ordinary circumstances they were raised within a short time of reaching the bottom. On this day they were met by an official who told them to proceed by the communication road to the shaft of No. 1 pit. Here they had to wait at a mid-landing about an hour and a half until the men from the lower seam who usually ascended by this shaft had been raised. No. 1 shaft was the downcast shaft for the air current which ventilated the mine. No. 2 shaft was the upcast shaft. At the mid-landing a very strong current of air blew in on Brown and his fellow miners who were waiting there to be raised. They had been sweating at their work and felt the down draught very cold and complained of it at the time. After the men had reached the surface Brown complained of feeling cold and his teeth

(1) (1913) 1 S. L. T. 174.

were chattering. The next morning Brown went down the pit, but he was unable to start work on account of illness due to the chill incurred on the previous day. He returned home and went to bed, pneumonia supervened, and he died therefrom on July 3, 1911.

In these circumstances the sheriff-substitute found that the deceased died from the effects of injuries by accident received by him on June 26 while in the course of his employment.

The question of law for the opinion of the Court was whether there was evidence upon which it could be competently found that the deceased sustained an accident arising out of and in the course of his employment.

The Second Division (the Lord Justice-Clerk, Lord Dundas, Lord Salvesen, and Lord Guthrie) answered the question in the negative and recalled the award of the arbitrator.

1914. March 30, 31. *Alexander Moncrieff, K.C.*, and *James Keith* (both of the Scottish Bar), for the appellant. There was here an unbroken chain of causation between the pneumonia and death at one end and the wreck in the shaft at the other. It is settled that disease contracted by accident may be an injury by accident within the meaning of the statute: *Dunham* v. *Clare* (1); *Brintons* v. *Turvey* (2); *Ystradowen Colliery Co.* v. *Griffiths* (3); *Clover, Clayton & Co.* v. *Hughes* (4); *Kelly* v. *Auchenlea Coal Co.* (5)

[LORD DUNEDIN referred to *Warner* v. *Couchman* (6) and *Blakey* v. *Robson, Eckford & Co.* (7)]

Physical impact is not necessary to constitute incapacity by accident: *Pugh* v. *London, Brighton and South Coast Ry. Co.* (8), approved by Lord Macnaghten in *Clover, Clayton & Co.* v. *Hughes.* (9) The decision of the Privy Council in *Victorian Railways Commissioners* v. *Coultas* (10), if and so far as it affirms the contrary, has been discredited in England (*Dulieu* v. *White* (11)), in Scotland (*Cooper* v. *Caledonian Ry. Co.* (12)),

(1) [1902] 2 K. B. 292.
(2) [1905] A. C. 230.
(3) [1909] 2 K. B. 533.
(4) [1910] A. C. 242.
(5) 1911 S. C. 864.
(6) [1912] A. C. 35.
(7) 1912 S. C. 334.
(8) [1896] 2 Q. B. 248.
(9) [1910] A. C. 242, at p. 248.
(10) 13 App. Cas. 222.
(11) [1901] 2 K. B. 669.
(12) (1902) 4 F. 880.

H. L. (Sc.) 1914 COYLE OR BROWN v. JOHN WATSON, LIMITED.

and in Ireland (*Bell* v. *Great Northern Ry. Co. of Ireland* (1)), and is adversely commented upon in Beven on Negligence, 3rd ed., pp. 66—76; and it cannot be now regarded as a binding authority. Upon this point *Yates* v. *South Kirkby Collieries* (2), in which the question arose under the Workmen's Compensation Act, is a direct decision in favour of the appellant. *Drylie* v. *Alloa Coal Co.* (3), which was approved by Lord Kinnear in *McLuckie* v. *John Watson, Ld.* (4), is indistinguishable in principle from the present case. There is no difference in principle between exposure to cold water and exposure to cold air. According to the tests laid down by the Master of the Rolls in *Eke* v. *Hart-Dyke* (5) in discussing under what circumstances disease constituted an injury by accident, the appellant is entitled to compensation. The appellant can indicate the time, place, and circumstances of the accident which occasioned the disease. [They also referred to *McMillan* v. *Singer Sewing Machine Co.* (6)]

The Lord Advocate (*Munro, K.C.*) and *Harold Beveridge*, for the respondents. It is necessary that the arbitrator should find (1.) a definite accident and (2.) an injury resulting from that accident. It is said now that the accident was caused by the breakdown of the machinery. But there is no trace of that point either in the judgments of the Court of Session or in the findings of the sheriff-substitute, and it is too remote. In no reasonable sense can the breakdown of the machinery be regarded as the cause of the injury; it has no proximate connection with the results which ensued. Similarly in *Drylie* v. *Alloa Coal Co.* (3) it was said that the accident was the breakdown of the pump, but Lord Dundas in the present case expressly disclaimed that view of the decision of the Court and was of opinion that the accident consisted in the abnormal accumulation of icy water at the bottom of the pit. The question before the Court in this case was whether the circumstances which occurred at the mid-landing constituted an accident. There was nothing in those circumstances which could be styled an accident within Lord

(1) (1890) 26 L. R. Ir. 428.
(2) [1910] 2 K. B. 538.
(3) 1913 S. C. 549.
(4) 1913 S. C. 975.
(5) [1910] 2 K. B. 677.
(6) (1912) 50 S. L. R. 220.

Macnaghten's language in *Fenton* v. *Thorley & Co.* (1) The death of the workman was caused by a chill owing to his exposure to a cold draught of air from waiting on the mid-landing. That was the proximate cause and it is not necessary to go beyond that. That was a novus actus interveniens. There was nothing unusual or unexpected in the fact that a miner who was hot got into a draught, and that fact cannot be properly described as an accident; it was an ordinary incident of his work. That is the point of distinction between this and *Drylie's Case.* (2) If the circumstances occurring at the mid-landing do not of themselves constitute an accident it is not permissible to regard the accident as a composite thing and pray in aid the breakdown of the machinery. The respondents do not dispute that physical lesion is not a necessary constituent of an accident.

[Lord Dunedin referred to *Wicks* v. *Dowell & Co.* (3), *Rodger* v. *Paisley School Board* (4), and *Manson* v. *Forth and Clyde Steamship Co.* (5)

Alexander Moncrieff, K.C., replied.

The House took time for consideration.

April 28. Lord Dunedin. My Lords, on the assumption that the case of *Drylie* (2) was well decided I am of opinion that this case is ruled by that. I cannot help thinking on perusing the opinion of Lord Salvesen that that learned judge really took the same view, although he did not wish to express a formal dissent from the views of the other members of the Second Division. It seems to me that here, as there, you have an accident interfering with the normal working of the mine, a consequential exposure of the workman to rigorous climatic conditions for a prolonged period, which exposure would not have been his fate but for the accident, and a finding in fact that the supervening illness was due to this prolonged exposure. There is no intervening circumstance depending on some cause other than the accident which occurs to break that chain of causation.

(1) [1903] A. C. 443.
(2) 1913 S. C. 549.
(3) [1905] 2 K. B. 225.
(4) 1912 S. C. 584.
(5) 1913 S. C. 921.

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I would illustrate what I mean by this by referring to the case of *McLuckie* v. *John Watson, Ld.* (1), where the wetting which brought on the chill was not a necessary result of the accident, but was due to the workman's determination not to wait his turn for the cage, but to stand in water in order to get in front of his fellows.

My Lords, as regards the case of *Drylie* (2) I was a party to that judgment, and I have seen no reason to alter the opinion I then formed. I have the satisfaction of knowing that those of your Lordships who have considered that case for the first time on this occasion have seen no reason to doubt that it was rightly decided.

Therefore I think that the present appeal should be allowed and the award of the arbitrator restored, and I move accordingly.

My noble and learned friend Lord Kinnear has asked me to state that he concurs in this opinion.

LORD ATKINSON. My Lords, this case has been very ably argued. The difficulties raised by the contention put forward by the learned Lord Advocate on behalf of the respondents arise, I think, from his effort, upon one point at all events, to disintegrate, as it were, the compound but injurious effect upon a workman of the forces or agents into contact with which he may by an accident be brought, separating the immediate and primary effect from the ultimate effect and endeavouring to establish a sequence of causation between them. He contended that the accident, under the Workmen's Compensation Act of 1906, must, to entitle the injured workman or his dependants to compensation, be the proximate cause of the personal injury, and insisted that in the present case the chill sustained by John Brown, the deceased workman, was the proximate cause of his death by pneumonia, and that the accidental breakdown or wreckage of the machinery of the mine in No. 2 shaft, so far from being the proximate cause of this chill, was either a mere historical event unconnected with it, or, at least, if a cause of it at all, a very remote cause.

By way of illustration I put to him during the progress of

(1) 1913 S. C. 975. (2) 1913 S. C. 549.

his argument the following question: Suppose an employer is, during very cold weather in mid-winter, driving in his motor car with two servants in front—his chauffeur and another—and suppose that when crossing a bridge over a river a tyre bursts, the car skids and comes into collision with one of the battlements of the bridge with such force and violence that both servants are precipitated into the river below, the one being drowned and the other rescued, but rescued so tardily as to be thoroughly chilled, and that an attack of pneumonia is thereby induced, of which disease he dies, would the dependants of the first man be entitled to compensation under s. 1 of the Act of 1906? The learned Lord Advocate answered in the affirmative, that they would be so entitled. I then asked him, Would the dependants of the second servant be similarly entitled? and as I understood him, he answered, as indeed the necessities of the case obliged him to answer, in the negative. But can there be any real distinction between these two supposititious cases in relation to this statute?

The accident, or the chapter of accidents, the primary accident, the bursting of the tyre, the consequential accidents, the skidding of the car, the collision with the battlement of the bridge, and the precipitation into the river, are common to both cases. The element into contact with which the deceased servants were brought, the cold water, is the same. The injurious effect of this element upon them is different. It smothered the one. That was the injury in his case. It chilled the other so badly that disease supervened. That was the injury in his case. According to the contention of the Lord Advocate, as I understood it, the bursting of the tyre, though it was the primary accident which, through the agency of other accidents consequent upon it, brought about the prolonged exposure of the deceased to the action of the cold water, was not the proximate cause of death.

The principle upon which cases should be dealt with under the statute where death or incapacity is caused to a workman by a disease induced by an "injury by accident" is clearly laid down in the well-known anthrax case, *Brintons* v. *Turvey*. (1) Lord Halsbury is reported to have expressed himself thus: "When

(1) [1905] A. C. 230, at p. 233.

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some affection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase 'accident causing injury,' because the injury inflicted by accident sets up a condition of things which medical men describe as disease. . . . . It does not appear to me that by calling the consequences of an accidental injury a disease one alters the nature or the consequential results of the injury that has been inflicted." Lord Macnaghten (1) said: "Speaking for myself, I cannot doubt that the man's death was attributable to personal injury by accident arising out of, and in the course of, his employment. The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease, which was immediately the cause of death, and would no doubt be certified as such in the usual death certificate." Lord Lindley (2) said: "In this case your Lordships have to deal with death resulting from disease caused by an injury which I am myself unable to describe more accurately than by calling it purely accidental."

In the present case there were two shafts to the respondents' mine, the downcast shaft No. 1 and the upcast shaft No. 2. The current of air which ventilated the mine passed down the former shaft.

The deceased workman, John Brown, started to work in the mine at 7 A.M. on the morning of June 26, 1911, at a place which was dry with a good current of air passing through it. Brown and his mates were sweating as they worked, their clothes were somewhat wet from this, not from any other cause Some breakdown of the machinery connected with shaft No. 2 took place. Brown and his companions were ordered, owing to this, to ascend to the surface, and while proceeding to No. 2 shaft to ascend in the ordinary and accustomed way, they were directed to ascend by No. 1 shaft instead. They attempted to do so, but were checked at the mid-landing for the very prolonged and entirely abnormal period of one and a half hours, during which the downward current of cold air was playing upon them. Brown, the deceased, was badly chilled by this prolonged and abnormal

(1) [1905] A. C. at p. 234. (2) Ibid. at p. 238.

exposure. Pneumonia was thereby induced, and from this disease he died. The immediate cause of the delay was this, that the men from the lower workings who were usually raised to the surface by shaft No. 1 had not been raised, and Brown and his companions were detained till these lower workers were raised. Thus, Brown and his companions were, owing to the accidental breakdown of the machinery in No. 2 shaft, placed by the orders of their master in a position in which they were, through the accident of the prolonged and abnormal delay, exposed to the action of the current of air while they waited. That exposure was not expected, intended, or designed, apparently, either by the employer or workmen. It was one of the consequential accidents arising from the primary accident, the breakdown of the machinery, just as the prolonged immersion in the river of the servant who was rescued was, in the supposititious case I have mentioned, one of the consequential accidents of the bursting of the tyre of the motor car. This accidental but prolonged exposure was the cause of the "injury," the chill. The pneumonia was only the disease brought on by that injury.

I do not think this case can be distinguished on any solid ground from the case of *Drylie* v. *Alloa Coal Co.* (1)

There owing to the breakdown of a pump the water in a mine accumulated so that the workmen had to stop work. They went to the shaft to ascend, and were kept waiting there for twenty minutes up to their knees in cold water, the cold air descending upon them. This abnormal exposure caused to the deceased a chill from which disease was set up. It would appear to me that the abnormal exposure to the action of the cold air and cold water in that case was on all fours with the abnormal exposure to the current of cold air in this case, and that the exposure in the latter case was quite as much an accident as in the former, and the chill quite as much an injury by accident in the latter case as in the former.

In my opinion therefore this appeal should be allowed with costs, and the question of law stated by the learned sheriff-substitute for the opinion of the Court should be answered in the affirmative.

(1) 1913 S. C. 549.

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LORD SHAW OF DUNFERMLINE. My Lords, this appeal arises out of an arbitration under the Workmen's Compensation Act, 1906. Sheriff-Substitute Shennan, an experienced arbitrator, sets forth the facts in a stated case and says: "In these circumstances I found that the deceased, John Brown, died from the effects of injuries by accident received by him on June 26, while in the course of his employment with the appellants, and awarded compensation."

In my opinion there is no ground for holding that the learned sheriff had in any respect misdirected himself in law; and the view that his finding was contrary to, or in no reasonable sense in accordance with, the facts proved appears to me to be equally unfounded.

One pit shaft in this mine was blocked by an admitted accident; a dislocation of the working arrangements ensued; the men had to be sent by another shaft under circumstances which exposed them to severe chill; this chill in one unfortunate workman's case brought on pneumonia, and of that the workman died. It appears to me both legally and philosophically incorrect to say that this should not be treated as a chain of causation—with the accident at the one end as cause, and death at the other end as effect. Wherever a chain of causation is alleged to exist it is possible to say that it is broken at a certain point, and to attribute the effect to a fresh and intervening factor. The sheriff, as the judge of the facts, did not find that the chain of causation was broken in this way. And I see no ground for saying that he erred.

I am accordingly of opinion that the judgment of the Second Division which recalled the arbitrator's finding and award should be reversed.

It would be unnecessary to say more but for certain considerations, to which, out of respect for the learned judges of the Second Division, it appears to me proper to allude. In the first place, the judgments distinguish the present case from a decision by seven judges of the Court of Session in Scotland (Lord Salvesen dissenting) in the case of *Drylie* v. *Alloa Coal Co.* (1) In that case by an accumulation of water in a mine (caused by a

(1) 1913 S. C. 549.

breakdown in the pumps) the workmen were forced to stand knee deep in water; one of the men was in consequence seized with pneumonia; and he died. The Act was held to apply and an award of compensation was made. I think that this was right and that the judgment was sound.

Had it been necessary, I should for myself have said that the principle of the present case was concluded by that applied in *Drylie*. (1) The cold element in the one case was water and in the other air. But, as Lord Salvesen indicates very clearly, there does not appear to be any other real ground of distinction between the two cases. In this I respectfully agree. Indeed, I do not entirely understand why that learned judge, accepting the *Drylie* (1) decision and not distinguishing the two cases, did not tender his dissent from the present judgment. But the learned counsel for the respondents were within their rights in maintaining that the present judgment is unanimous.

Before passing from *Drylie* (1) I desire to remark upon a passage in the judgment of Lord Dundas. That learned judge is reported to have said, "The circumstance of Drylie finding himself immersed to the knees in icy cold water was abnormal; it, in its turn, was, as matter of fact, due to an abnormal cause—the stopping of the pump while men were at work in the pit; and, if the pneumonia of which he died was in fact caused by his immersion, I think the elements of an 'accident' are here present." I am aware that, in the present case, the views of Lord Dundas do not exactly equate with those just cited from that report. But these sentences do appear to me to give, if I may say so, such a clear statement of a chain of causation, connecting the whole with the statutory provision, that I should humbly have adopted them if *Drylie* (1) had directly reached this House.

For the reasons given, I think that the present case was ruled by the judgment in *Drylie* (1), and the departure in the present case from its principles—for I am humbly of opinion that the two cases cannot stand together—makes the present appeal of importance, and that particularly in regard to one point.

The point appears most clearly from the opinions of Lord Salvesen, and it is this: that countenance appears to be given

(1) 1913 S. C. 549.

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to the view that the compensatory provisions of the statute cannot be invoked unless injury be caused by "physical impact." This is, at this time of day, a most serious and, in my humble opinion, a most disturbing and erroneous proposition. I think Mr. Moncrieff in his able address and citation of authority was right so to treat it.

Lord Salvesen elaborately argues and illustrates the point in *Drylie*. (1) It is fair to the learned judge to say that he indicates that in his view the pneumonia which supervened to the workman may have not been causally attributable to the accidental exposure, but merely to neglect. But while this is so, the learned judge does appear to give some countenance to the idea that physical impact, or, indeed, direct lesion, is required in order to enable compensation to be given. He observes, for instance: "The only case decided in the House of Lords, so far as I am aware, where a death from disease not preceded by some direct lesion was held to be a death resulting from injury by accident is the well-known anthrax case." And in another passage he says: "In all such cases, if we are to affirm the judgment of the sheriff-substitute, it will be open for the arbitrator to find, if he were bold enough to attribute the disease to a particular exposure resulting from some accidental occurrence, that it was the result of accident within the meaning of the Act."

My Lords, I pass by the form of the expression, "if he were bold enough to find," and take the learned judge to mean "if he found as a fact that" the disease arose from exposure, &c.

It must be observed that the statute itself in no way limits the causal connection between accident and disease to cases of physical impact, nor does it treat the connection itself as anything extraordinary. In the section dealing with industrial diseases it provides that "nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply, if the disease is a personal injury by accident within the meaning of this Act."

In the second place, such a restriction, excluding all cases, however serious,—say of shock and the like—unless physical

(1) 1913 S. C. 549.

impact or lesion had occurred, has, in my opinion, no justification in the state of the authorities. The one case cited in its favour is *Victorian Railways Commissioners* v. *Coultas*. (1) The case was decided by the Privy Council, and it is observable that the judgment of the Board was in form merely on the point of remoteness of damage. "Their Lordships are of opinion that the first question, whether damages are too remote, should have been answered in the affirmative, and on that ground, without saying that 'impact' is necessary, that the judgment should have been for the defendants." But there undoubtedly are observations by Sir Richard Couch of a more definite character. For instance, the learned judge, deprecating the extension of liability, does say, "In every case where an accident caused by negligence had given a person a serious nervous shock there might be a claim for damages on account of mental injury," and he observes on the chance of a wide field for imaginary claims. In the present case and in *Drylie* (2) one may discern traces of similar views.

But in England, in Scotland, and in Ireland alike, the authority of *Victorian Railways Commissioners* v. *Coultas* (1) has been questioned, and, to speak quite frankly, has been denied. I am humbly of opinion that the case can no longer be treated as a decision of guiding authority.

The subject was, if I may say so, examined with much erudition and care by the Lords Justices in *Dulieu* v. *White* (3), and the *Victorian Railways* case (1) was held not binding. I may be permitted respectfully to agree with the judgment of Kennedy L.J. in his observations thereon. It may be added that these were in line with certain dicta of Lord Esher on the same topic in *Pugh* v. *London, Brighton and South Coast Ry. Co.* (4)

In Scotland that very learned judge, Lord Stormonth Darling, in *Cooper* v. *Caledonian Ry. Co.* (5), stated broadly and emphatically that *Victorian Railways Commissioners* v. *Coultas* (1) was no part of the law of Scotland. Probably, however, no better analysis of it has been made than by Palles C.B. in the Irish case of *Bell* v. *Great Northern Ry. Co. of Ireland* (6), and I

(1) 13 App. Cas. 222.
(2) 1913 S. C. 549.
(3) [1901] 2 K. B. 669.
(4) [1896] 2 Q. B. 248.
(5) 4 F. 880.
(6) 26 L. R. Ir. 428.

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desire to tender my respectful adhesion to and approval of that judgment. I should add that other cases were cited showing it to be fully established by authority—recent and strong authority—that physical impact or lesion is not a necessary element in the case of recovery of damage in ordinary cases of tort.

On principle, the distinction between cases of physical impact or lesion being necessary as a ground of liability for damage caused seems to have nothing in its favour—always on the footing that the causal connection between the injury and the occurrence is established. If compensation is to be recovered under the statute or at common law in respect of an occurrence which has caused dislocation of a limb, on what principle can it be denied if the same occurrence has caused unhinging of the mind? The personal injury in the latter case may be infinitely graver than in the former, and to what avail—in the incidence of justice, or the principle of law—is it to say that there is a distinction between things physical and mental? This is the broadest difference of all, and it carries with it no principle of legal distinction. Indeed it may be suggested that the proposition that injury so produced to the mind is unaccompanied by physical affection or change might itself be met by modern physiology or pathology with instant challenge.

The other case, of which the present is an example, is much narrower—a case of injury to the body, a physical injury, but a physical injury not caused by physical impact. On the point of the principle of liability, what is there to distinguish the case of a man who is drowned in a scuttled boat from that of another who is immersed and sustains a chill resulting in his death? Make the difference still narrower—as narrow, for instance, as between this case and *Drylie*. (1) The fatal pneumonia of one man is produced by his standing in cold water, and of a second by his standing in cold air. How the particular element which was the medium through which the producing cause operated towards the fatal result should have any legal effect in altering either the range or the canon of liability does not appear to my mind.

(1) 1913 S. C. 549.

The truth is, my Lords, that the difference between all such cases is not one of principle. It is one of the things which occur, and may prove difficult, in the region of evidence. But wherever the causal connection between occurrence and result be established, the principle to be applied is, as it ought to be, the same. The difficulty of establishing the causal connection may be, of course, much greater in the one case than in the other, and Courts of law are justified in demanding in all cases, and especially where external signs are wanting, that the relation of cause and effect be sufficiently established. If, however, it be established, then the liability in my humble judgment follows.

I am of opinion that the appeal should be allowed with costs.

LORD PARMOOR. My Lords, this is an appeal against the decision of the Second Division of the Court of Session in Scotland upon a case stated in an arbitration under the Workmen's Compensation Act, 1906. The arbitrator found that John Brown died from the effects of injuries by accident received by him on June 26, 1911, while in the employ of the respondents, and awarded compensation to the appellant.

The material facts are that between 8 and 9 o'clock on the morning of June 26, 1911, all the men in the pit where Brown was working were ordered to ascend to the surface in consequence of a wreck in the shaft. On their way they were met by an official, who told them to proceed by the communication road to the shaft of No. 1 pit. They had to wait at a mid-landing for about an hour and a half, until the men from the lower seam, who usually ascended by this shaft, had been raised. At the mid-landing, during the period of waiting, a strong current of air blew in on Brown and his fellow miners. When the men reached the surface Brown complained of feeling cold, and died from pneumonia due to the chill incurred while waiting at the mid-landing. Under these circumstances the arbitrator awarded compensation to the appellant, but the judges in the Second Division of the Court of Session in Scotland found that such award was not within the competency of the arbitrator.

It was not denied by counsel for the appellant that in order successfully to maintain a claim for compensation under the

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Workmen's Compensation Act, 1906, there must be an accident in the ordinary popular meaning of that term, and an injury attributable to such accident. The accident relied upon is the wreckage of the shaft, and the injury the chill from which Brown took pneumonia and died. The answer of the respondents is that the wreckage of the shaft should be considered merely as an historical incident in the narrative of the case, and as too remote a factor to which to attribute the injury, and that in any case the injury cannot fairly be attributed to the wreckage of the shaft.

My Lords, I cannot assent to this argument on behalf of the respondents. The delay in the landing where the chill was caught appears to me to be clearly attributable to the wreckage of the shaft, and but for such wreckage would not have occurred. The incidents are closely connected and cannot be treated as independent and detached factors. On the other hand, it is not questioned that the delay on the landing in a draught did cause the injury which resulted in Brown's death. There are both the necessary elements to maintain a claim, a definite accident and injury fairly attributable thereto. It is not material that the wreckage of the shaft did not result in physical impact causing physical injury, or that no one could have foreseen the delay on the landing, and the subsequent chill, as a probable or natural result of the wreckage of the shaft. Such considerations do not arise in a claim under the Workmen's Compensation Act. The workman under the Act is as much entitled to compensation if death results from exposure consequent on and attributable to an accident as he would be if death had resulted from immediate physical injury.

My Lords, a number of authorities were quoted by the counsel for the appellant. It is only necessary to refer to two of them. The case of *Victorian Railways Commissioners* v. *Coultas* (1) was quoted as an authority for the doctrine that in ordinary accident cases some form of physical impact is a necessary element to found a claim for damage. The case does not appear to support this contention, nor do I think that any such contention could be supported. The following passage occurs in the judgment:

(1) 13 App. Cas. 222.

"Their Lordships are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative and on that ground, without saying that "impact" is necessary, that the judgment should have been for the defendants."

The second case is *Drylie* v. *Alloa Coal Co.*(1) My Lords, I am unable to distinguish this case from the present case. It cannot be material, for the purpose of a claim under the Workmen's Compensation Act, whether the chill resulted from exposure to a current of air or to cold water, so long as the exposure is attributable to the accident, and has caused the injury on which the claim to compensation is founded.

In my opinion the appeal should be allowed, and the question of law stated by the arbitrator for the opinion of the Court should be answered in the affirmative.

Interlocutor of the Second Division of the Court of Session in Scotland reversed and award of the sheriff-substitute of Lanarkshire restored : The respondents to pay the costs in the Court of Session and also the costs of the appeal to this House.

Lords' Journals, April 28, 1914.

Agents for appellant: *Deacon & Co., for Hay, Cassels & Frame, Writers, Hamilton, and Simpson & Marwick, W.S., Edinburgh.*

Agents for respondents: *Beveridge, Greig & Co., for W. T. Craig, Writer, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

(1) 1913 S. C. 549.

[HOUSE OF LORDS.]

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AND

May 14. WISHART . . . . . RESPONDENT.

Employer and Workman—Review of Weekly Payments—Termination—Date from which Weekly Payments may be ended—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 16.

Where an injured workman who is in receipt of compensation under the Workmen's Compensation Act, 1906, completely recovers from his incapacity, and no further payment is made to him thereafter, it is competent to the arbitrator, upon an application to review asking for the termination of the weekly payments as from the date of recovery, to terminate the weekly payments as from that date.

Semble the same principle applies to an application to diminish or increase the weekly payments.

Whether payments made after the date of recovery can be recovered by the employer, quaere.

Donaldson Brothers v. *Cowan*, 1909 S. C. 1292, overruled.

Decision of the Second Division of the Court of Session in Scotland reversed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland in a stated case under the Workmen's Compensation Act.

On May 11, 1912, the respondent applied to the sheriff-substitute of the Lothians and Peebles for an award of compensation in respect of injuries sustained by him on April 23, 1912, by accident to his right hand arising out of and in the course of his employment with the appellants as a dock labourer. On August 5, 1912, the sheriff-substitute issued his award in which he found that the respondent was then totally incapacitated and was entitled to compensation at the rate of 14*s.* per week from and after April 23, 1912. The appellants paid the respondent compensation in terms of the award up to September 24, 1912. On November 4, 1912, the appellants presented an application for

* *Present:* VISCOUNT HALDANE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

review to the sheriff-substitute and craved that the weekly payment should be ended as at September 24, 1912, in respect that the respondent had by that date completely recovered from the accident.

The facts found by the sheriff-substitute were shortly as follows: The respondent had on September 24, 1912, completely recovered his capacity for work as a dock labourer. On September 24, 1912, he left Scotland, and on September 25 he entered into employment at Chesterfield at first as a detective and afterwards as a member of the police force and was earning the full rate of wages for a police constable. In these circumstances the sheriff-substitute ended the compensation payable under the award as at November 4, 1912, the date of the presentation of the application for review. He would have ended the compensation as at September 24, 1912, had it been competent for him in that application to do so; but he held that it was not competent for him to do so in respect that by doing so he would be disturbing a decree of Court as at a date when there was no proper application to enable that to be done.

The questions of law for the opinion of the Court were:—

1. Whether it was competent for the sheriff-substitute to end the compensation at September 24, 1912.

2. Whether he ought to have ended the compensation at that date.

The Second Division (Lord Dundas, Lord Salvesen, and Lord Guthrie), being of opinion that the case was ruled by *Donaldson, Brothers* v. *Cowan* (1), answered the first question in the negative and affirmed the determination of the sheriff-substitute.

The respondent did not appear.

1914. April 21. *H. P. Macmillan, K.C.* (of the Scottish Bar), and *Alexander Neilson*, for the appellants. Where a workman has completely recovered from his injuries and no payment is made to him after the date of recovery it is competent to the arbitrator upon an application to review to terminate the weekly payment as at the date of the recovery. This is in effect an appeal from *Donaldson Brothers* v. *Cowan* (1), by which the

(1) 1909 S. C. 1292.

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Second Division held itself bound. It was there decided by seven judges of the Court of Session that the arbitrator was entitled to vary the payment as from the date of the application but not from any earlier date. That decision produces a most inequitable result, because some delay must necessarily occur between the examination of the workman and the application to review, and one side or the other will be prejudiced in the interval. It is moreover contrary to the scheme of the Act, which by Sched. I., paragraph 1 (*b*), provides the rate of compensation to be paid during the incapacity, and in the forms appended to the rules made under the Act the form of award provides for the payment of compensation during the total or partial incapacity of the workman, and the result in this case is to give the workman a weekly payment to which he is not entitled under the Act. There is no logic in fixing the date of the application as the crucial date; it should be either the date of the recovery or the date of the judgment, as had theretofore been the rule in Scotland: *Steel* v. *Oakbank Oil Co.* (1); but the objection to that date is that it results in destroying the nature of the summary remedy provided by the Act. Paragraph 16 of Sched. I., which provides for a review of weekly payments, contains nothing which prevents the arbitrator from saying as from what date the alteration shall take place. The words "on such review" do not mean at the date of the review but in the proceedings for review. In England the view has been expressed by many judges that upon an appropriately framed application to review it is competent for the arbitrator to terminate the weekly payment as from the date of recovery, although the precise point has never actually arisen for decision: *Morton & Co.* v. *Woodward* (2); *Upper Forest and Western Steel and Tinplate Co.* v. *Thomas* (3); *Charing Cross, Euston and Hampstead Ry. Co.* v. *Boots* (4); *Hosegood & Sons* v. *Wilson.* (5) It is not necessary that there should be a formulated dispute as to the workman's incapacity to entitle the employer to apply for a review, and in any case the cesser of the weekly payment is sufficient evidence of a dispute:

(1) (1902) 5 F. 244.
(2) [1902] 2 K. B. 276.
(3) [1909] 2 K. B. 631.
(4) [1909] 2 K. B. 640.
(5) [1911] 1 K. B. 30.

Tyne Tees Shipping Co. v. *Whitlock.* (1) Sched. II., paragraph 9 provides for the recording of a memorandum of the award or agreement fixing the compensation and says that "thereupon the memorandum shall for all purposes be enforceable as a county court judgment," but it does not say that it shall be equivalent to a county court judgment for all purposes, and the Scottish decisions have proceeded upon a misapprehension of that provision.

The House took time for consideration.

May 14. VISCOUNT HALDANE L.C. (2) My Lords, the main facts out of which the question to be decided in this appeal arises may be stated briefly.

On April 23, 1912, the respondent, who was a dock labourer in the employment of the appellants, sustained an injury by accident arising out of, and in the course of, his employment. On August 5 the sheriff-substitute made an award under the Workmen's Compensation Act, 1906, under which he decided that the respondent was totally incapacitated, and was entitled to compensation at the rate of 14*s.* a week from and after the date of the injury. The appellants paid this compensation up to September 24, 1912, but after that date they paid nothing. On November 4 they applied under the First Schedule to the statute for review of this compensation, and asked that it might be ended as from September 24, on the ground that the respondent had then completely recovered, and had since been earning wages at the ordinary rate. The sheriff-substitute found that this was so, and ordered the compensation to end as from November 4, the date of the application for review. He stated that he would have ordered it to end as from September 24 had it been competent for him to do so, but that he considered that the law did not enable him to disturb a decree of the Court as at a date when there was no application to enable this to be done. The question is whether this decision was right.

My Lords, the answer to this question must depend on the proper interpretation of the terms in which the Act of Parliament

(1) (1913) 6 B. W. C. C. 559. (2) Read by Lord Atkinson.

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has set up the jurisdiction, a jurisdiction which is new and is the creature of the statute.

The learned judges of the Second Division were of opinion that the sheriff-substitute, who stated the question of law for their decision, had no power to end the compensation as from a date antecedent to the application for review. They agreed with the sheriff-substitute in thinking that the point had been disposed of by a case which bound them, *Donaldson Brothers* v. *Cowan.* (1) In that case the First Division, with three consulted judges of the Second Division, construed the statute as meaning that it was not competent to end compensation at a date antecedent to that of the application for review notwithstanding that it was proved that incapacity had ceased at an earlier date. They held that the proper date of ending was that of the presentation of the application to review. The basis of their decision was, in the words of the Lord President (Lord Dunedin), that "when compensation is once fixed the only way to alter it is that provided by the statute—an application to vary." Lord Dunedin went on to indicate that he differed from the view which had been suggested in certain decisions of the Court of Appeal in England. The Master of the Rolls (Lord Collins) said in *Morton & Co.* v. *Woodward* (2) that "the scheme of the Act is that compensation is to be given during the period of incapacity —that is, incapacity of the workman to earn his wages. Therefore, when a dispute arose as to the man's incapacity for work, the essential question was his condition, not when the Court was able to give its attention to the matter, but when the dispute was formulated as to whether the man's incapacity had ceased or not." This view received varying degrees of countenance from the judges of the Court of Appeal in *Upper Forest and Western Steel and Tinplate Co.* v. *Thomas* (3), *Charing Cross, Euston and Hampstead Ry. Co.* v. *Boots* (4), and *Hosegood & Sons* v. *Wilson.* (5)

My Lords, the language of the statute on which depends the solution of this conflict between these judicial opinions leaves a

(1) 1909 S. C. 1292.
(2) [1902] 2 K. B. 276.
(3) [1909] 2 K. B. 631.
(4) [1909] 2 K. B. 640.
(5) [1911] 1 K. B. 30.

good deal to be desired in point of precision. But after some hesitation I have come to the conclusion that the interpretation placed on it by the appellants is the true one. Paragraph 1 of the First Schedule provides that the amount of compensation, where total or partial incapacity for work results from the injury, is to be a weekly payment *during the incapacity*. The jurisdiction to award the weekly compensation is thus limited to the period of the incapacity. The arbitrator is to decide that there is incapacity, but he cannot make an award which will carry the compensation beyond that period. By paragraph 14 the workman receiving weekly payments is to submit himself, if so required, from time to time to examination by a doctor provided by the employer. By paragraph 15, if as the result an agreement is not reached as to the workman's condition, the question may be referred by the officer of the Court to a medical referee, whose certificate is to be conclusive. Paragraph 16 contains words which, taken by themselves, are ambiguous. It provides that " any weekly payment may be reviewed at the request either of the employer or of the workman, and *on such review* may be ended, diminished, or increased." At first sight these words suggest that the right to payment up to the date of the review being a right arising from the previous finding, that finding and the title arising under it can only be got rid of by a second finding, that effecting the review, and only as from the date of the second finding and not retrospectively. But I do not, on consideration, think that this construction is consistent with the provision to which I have already referred, limiting the compensation to the period of incapacity. If on the review it is decided that payment of compensation ought to cease, on the ground that the workman, in fact, ceased to be incapable at a date previous to the application, I do not see how, this being a judicial review of the state of health subsequent to the previous decision, and the result of that decision having been limited to the period of incapacity, the workman can claim that payments should be made to him after he must be taken to have ceased to be incapable. What is brought under review is the continuance and duration of the incapacity.

My Lords, in the case before us no question arises as to

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repayment to the appellants of money obtained from them after the incapacity ceased. In point of fact they paid nothing after September 24. Had they paid, and were they now seeking to recover the money, another question would arise upon which I express no opinion. The weekly payments would have been made under a decree which was on the face of it valid, and which was not reviewed in any proceeding in the nature of an appeal, but stood until its effect was terminated by the exercise of a subsequent and original jurisdiction. It may be that what had been paid under the first decree could not have been recovered. As to this I say nothing, for no such point arises. The only question is whether the words in the schedule to which I have referred enabled the sheriff-substitute to pronounce that the incapacity had ended before the application to review, in this case on September 24. I think that they did. The alternative construction would allow the workman to claim payment notwithstanding that incapacity had ceased. I think the intention of the Act is to give compensation only during incapacity. If it has ceased and the employer has not availed himself of his right to apply for review, it may be, as I have already said, that he cannot recover what he has paid while the first decree remained uninterrupted in its operation. But that would not involve the further conclusion that the judicial authority was precluded from subsequently determining the real date when the incapacity during which alone the first decree could properly continue undisturbed to operate had come to an end. It appears to me that the words "on such review may be ended, diminished, or increased" must, having regard to the provisions of paragraph 1 of the schedule, be read as enabling a review to be made retrospectively. No doubt such a review is not in the nature of an appeal or a rehearing. Its character is, as I have already said, rather that of an original application. But I see no reason why the words should be read without reference to their context in the earlier provisions of the schedule, and I think that so read they import the construction I have indicated.

I am, therefore, of opinion that the appeal must be allowed.

My Lords, there is one further observation which I wish to make. There are differences between the procedure in Scotland

and the procedure in this country which the statute recognizes and provides for. I have had the advantage of reading the judgment of my noble and learned friend Lord Shaw, and I concur in the suggestion made at the end of that judgment as to the practical method of conforming to the requirements of Scottish procedure. It is important that on a point like this we should not introduce confusion about well settled principles.

Lord Atkinson. My Lords, this case came before the Court of Session, on a case stated by the sheriff-substitute. The respondent was, by an award of the arbitrator, dated August 5, 1912, awarded under the Workmen's Compensation Act, 1906, compensation, fixed at 14*s.* per week, from the date of the injury he had sustained in respect of his total incapacity due to an injury by accident arising out of and in the course of his employment. This award has not been printed in the case, but it is clear from the provisions of the 1st section of the statute, coupled with those of paragraph 1 (*b*) of the First Schedule annexed to the Act, that the arbitrator, the sheriff-substitute in this case, had only jurisdiction to direct the weekly payments to be made during the respondent's incapacity. It must therefore be assumed, at least in the absence of the order, that it was framed in conformity with these enactments, and was expressly or impliedly qualified so as not to be ultra vires.

On November 4, 1912, the appellants presented an application for the review of those weekly payments under the provisions of the 16th paragraph of the First Schedule. In that application they averred as a fact that the respondent had by September 24, 1912, completely recovered from the effect of the accident, and had since that date been working in England and earning the ordinary rate of wages there. They, accordingly, claimed that the weekly payment should for these reasons be ended as from that date. The appellants had refused to make, and did not make, any weekly payments to the respondent since September 24, 1912. So that the question of the right of an employer to recover back from a workman weekly payments made after incapacity had in fact ended, but before review, does not arise in this case at all. Whenever it does arise much may turn

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on the special facts of the case in which it arises, and I therefore advisedly abstain from expressing any opinion upon a point which is not raised, and could not be raised in this case, and has, necessarily, not been argued. The sheriff-substitute has found as a fact that on September 24, 1912, the respondent had recovered complete capacity for work. He states that he ended the compensation as at November 4, 1912, the date at which the appellants presented their application for review, but that he would have ended it on September 24, 1912, had he considered it was competent for him to do so. And the questions of law which he submitted for the opinion of the Court of Session are the following:—"(1.) Was it competent for me to end the respondent's compensation on September 24, 1912? (2.) Ought I to have ended the compensation on that date?" These are the only questions before your Lordships' House for decision, and the answers which should be given to them must, in my view, depend entirely on the proper construction of the statute and the schedules attached to it, and on that alone.

Now, the 1st section of the Act runs thus: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as herein-after mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." On referring to the First Schedule, paragraph 1 (*b*), coupled with paragraph 3, it is clear that what was aimed at was, by the payment of weekly sums during incapacity, total or partial, to compensate the workman for the loss of the power to earn wages. But as this incapacity, whether total or partial, might diminish or cease altogether, and as partial incapacity might develop into total incapacity, it was necessary to provide machinery for the adjustment, in the interest of employer and workman alike, of the weekly payments according to the changing condition of the workman subsequent to the first award. Accordingly it is provided that any workman receiving weekly payments under the Act must, if required by the employer, from time to time submit himself for examination by a medical man, and elaborate provisions are made for the reference of the question of the workman's fitness for employment to a medical referee.

Paragraph 16 deals with the review of these weekly payments, not a review in the nature of an appeal from the award made in the first instance by the arbitrator, who decides on the existence of incapacity when he makes his award, but a review directed to the question whether, owing to changed conditions, these weekly payments should be increased, diminished, or made to cease. It is a review, moreover, which may be effected under paragraph 16 by the agreement of the parties, and would more properly be styled a re-estimation or revision of the amount of compensation awarded rather than a review of the award itself. It is only when the parties fail to review by agreement that the matter is to be settled by arbitration. It was suggested in argument that the award of an arbitrator, whether original or made on a review under paragraph 16, is in the nature of a judgment of a county court. That this is an error is, in my view, clear from the provisions of paragraph 9 of the Second Schedule. By that paragraph the same effect is given to a memorandum embodying the terms of the agreement of the parties as is given to a memorandum embodying the decision of an arbitrator. The memorandum, when recorded, is, in either case, no doubt enforceable as a judgment of the county court, but that is a very different thing from saying that on registration it in England becomes a judgment of a county court. The judge of the county court is not functus officio when he makes his award in the first instance. Should the parties fail to agree to review the weekly payment, he is brought into touch with the matter again, and can himself do that for them, increasing or diminishing or making the payments to cease as to him shall seem necessary to meet the justice of the case. For myself I may say that I utterly fail to see upon what principle of justice a workman is, under a decision awarding to him weekly payments during his incapacity, entitled to receive a single payment after his incapacity has ceased, or that when proceedings for review have been properly instituted the employer is not entitled to have the weekly payments ended from the time the incapacity is proved to have ended, at all events where, as in the present case, the employer has by his application given the date when he alleges incapacity

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has ended in fact, and claims to have the payments ended from that date.

According to the rules to which your Lordships' attention has been called the practice prescribed in England, when an employer raises a defence against the enforcing of the payment of a weekly sum on the ground that incapacity has ceased, is apparently to make the order for payment but to stay the execution of it until the employer has had an opportunity of making a proper application for review, on the terms, however, that the amount awarded should be paid into Court. This would appear to me to be a most convenient and proper course. My noble friend Lord Shaw has dealt with the Scotch practice. I am clearly of opinion that both the questions submitted by the sheriff-substitute for the opinion of the Court should be answered in the affirmative. With all respect to the learned and distinguished judges who decided the case of *Donaldson Brothers* v. *Cowan* (1), I am not quite sure that the peculiar nature of the awards of compensation under this statute was steadily kept in view by them in that case.

It may well be that as a general rule judgments of Courts of law stand until they are reversed, and that when the right is claimed to modify them, the relief, when given, should only operate either from the time it is claimed, or from the time it is granted, according to the circumstances of the case; but where, as in this case, something is by an award directed or ordered to be done during the continuance of a certain state of circumstances, or until the happening of a certain event, then that judgment or order by its very terms directs that this thing need not be done when those circumstances have altered in the way contemplated, or that event has occurred. And, all questions of laches or acquiescence apart, I can see no reason why, where in a proper proceeding the fact is established, that the particular state of circumstances has ceased, or the particular event has occurred when the thing directed should cease to be done, the arbitrator should not be entitled to make an order, in truth, only carrying into effect the first order, and direct that this thing need not be further done.

(1) 1909 S. C. 1292.

Though it is not necessary for the decision of this case to determine whether any different rule or principle should apply where it is merely claimed that the weekly payments should be diminished or increased, still I may say for myself that the inclination of my present opinion is that the same general principle should apply in the one case as in the other, and that the weekly payments should be varied from the time the circumstances justifying the change are shown to have occurred. I think the judgment appealed from was erroneous and should be reversed, and this appeal allowed, but without costs.

Lord Shaw of Dunfermline. My Lords, this appeal arises out of an arbitration under the Workmen's Compensation Act. The arbitration was in a process of review of a weekly payment made under a previous award. The facts must be taken as they are set forth in the stated case. They have been already fully adverted to.

From that case it appears that the respondent had on August 5, 1912, been found by the sheriff to be totally incapacitated for work. It is also "found as a fact that on 24th September, 1912, the respondent had recovered complete capacity for work." Not only so, but since that date, or rather since September 25, it is found that the respondent has been fully employed and earning wages. In these circumstances the respondent claims that the weekly payments awarded to him during incapacity should be continued to him after his incapacity has ceased and he has been earning wages elsewhere. I think that this claim cannot be defended on any principle of common honesty. Nor do I think that it can be justified on any principle of law. For this reason I humbly agree that the judgments appealed from should be reversed.

The proceedings for review of the weekly compensation began on November 4. It is clear that the learned arbitrator felt that to say that the cessation of incapacity then began was erroneous. The incapacity had ceased two months before. Quite correctly, however, interpreting the decision in *Donaldson Brothers* (1), he felt himself prevented from getting back to the true date, or nearer thereto than the date of the petition for review. The

(1) 1909 S. C. 1292.

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judgment of the Court below in the present case also followed that of *Donaldson.* (1)

The case is not complicated by any payments having been made since the incapacity ceased. Where payments are, in fact, made, and repetition is demanded, there may be various considerations for and against such repetition: and pleas of bar, closed account, laches, and the like might come to be discussed. I humbly agree with the views on that subject expressed in the opinion of the noble and learned Lord Chancellor. These may be exceptional cases. But it may in general be said that when both parties to an award do act in terms thereof, they will be presumed to do so on the footing of admitting that the conditions of the award were fulfilled and applied. It appears to me that so far as proceedings under the Act are concerned—for I exclude other remedies grounded upon allegations of concealment, fraud, or the like—they ought not to be utilized so as to rip up concluded transactions.

In Scotland the effect of the recording of the award—an effect making it by the Act "enforceable" as a decree arbitral—appears to some extent to have been emphasized at the expense of the consideration that the weekly payment was to be made during the continuance of the incapacity. I humbly look upon all the provisions as to procedure for review of the award to be provisions to enable Courts and arbitrators to get back to that cardinal point, to prevent compensation during incapacity being turned into compensation during capacity, and so to readjust awards of total or partial incapacity as to square with the facts.

An instance of what I mean is the judgment in the two cases of *Steel* (2) and *Pumpherston Oil Co.* (3) A process of review may be lengthy, and judgment in it for many reasons may be much delayed. But these cases held that, until final judgment in the review was given, the old award (although proved to have been long out of accord with the facts) stood. This was ever law in England, and is, of course, not now law in Scotland.

A great advance in Scotland was made by *Donaldson.* (1) This carried the change in liability a long step nearer to the change

(1) 1909 S. C. 1292. (2) 5 F. 244.
(3) (1903) 5 F. 963.

in the facts, and dated the former, not from the judgment in the application for review, but from the application itself. And I confess that, while I entirely agree that the case of *Donaldson* (1) was erroneous in not going further, I feel some of the difficulties alluded to in the Court of Session by Lord Dunedin. It is, of course, not of real assistance, however, that the award, or even the recorded agreement of parties, "shall be enforceable" as a decree of Court. For the enforceability cannot affect the liability for or the existence or the quantum of the debt. Assume, however, an award made and recorded, the practical question is how is it to be treated after a dispute arises? By this I mean, not in the sense of a legally formulated dispute, but in the sense of an actual difference between the parties as to whether the condition of incapacity continues. The parties differ. In one case the workman alleges that his partial incapacity has now become total incapacity, and that the award should be increased. In another case the employer alleges that the incapacity ceased as at a certain date, and that the compensation should cease then, and he, in fact, has stopped on that account all further payments. The latter instance is the present case. But assume that in such an instance the workman denies any change of circumstances, and that accordingly a charge for payment in execution of the award is made. In my opinion the duty of the employer in such circumstances is instantly to institute proceedings for review by the arbitrator under the statute. He cannot bring a suspension of the charge in the ordinary sense so as to review the disputed circumstances in that process; but if the charge is persisted in he may pro forma bring a suspension and table his application to the arbitrator for review, and the Court would at once suspend in hoc statu and sist all procedure in the suspension to enable the proper and statutory review to proceed. This, in my opinion, is the sensible course. It is a course which is suitable in Scotland, and it is in substance analogous to the procedure in England.

I agree with your Lordships that the appeal should be allowed, and that the questions stated by the learned arbitrator should both be answered in the affirmative.

(1) 1909 S. C. 1292.

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LORD PARKER OF WADDINGTON. (1) My Lords, I agree. The liability imposed on the employer by s. 1, sub-s. 1, of the Act of 1906 is a liability to pay compensation in accordance with the First Schedule to the Act; that is, in the case of total or partial incapacity resulting from the injury, to pay a weekly sum during the incapacity. By s. 1, sub-s. 3, any question as to the amount or duration of the compensation is, in default of agreement, to be settled by arbitration. Any question as to the duration of the compensation must therefore in reality be a question whether the incapacity during which it is payable did or did not exist at the particular punctum temporis at which it is alleged that the compensation ceased to be payable.

In the present case the accident resulted in the total incapacity of the workman, and by the award of the sheriff-substitute dated August 5, 1912, the compensation payable was fixed at 14*s.* a week. The precise terms of this award are not in evidence, nor indeed do they appear to be material, for the duty of the sheriff-substitute was merely to fix the amount of the weekly sum payable. He had no jurisdiction to determine prospectively—indeed, it would be impossible to determine prospectively—the duration of the weekly payment, which depended on the duration of the incapacity. The weekly sum payable under the award was paid until September 24, 1912. As from that date the employer refused to pay it, on the ground that the incapacity had then determined. There thus arose a dispute as to the duration of the compensation, and, the parties having failed to come to an agreement, this dispute was referred, as provided by the Act. The sheriff-substitute found that the incapacity had ceased on September 24, 1912. Logically, therefore, it followed that the weekly sum ceased to be payable on and after that date. The sheriff-substitute, however, felt himself constrained to hold, on the authority of *Donaldson Brothers* v. *Cowan* (2), that the weekly sum did not cease to be payable until November 4, 1912, being the date upon which the arbitration proceedings in which his award was given were initiated. In this he was upheld by the order of the Second Division, now appealed from.

The decision in *Donaldson Brothers* v. *Cowan* (2) turned on the

(1) Read by Lord Shaw of Dunfermline. (2) 1909 S. C. 1292.

true meaning and effect of the provisions of paragraph 9 of the Second Schedule and paragraph 16 of the First Schedule of the Act. By the first of those paragraphs it is provided that any agreement or award determining the amount of the compensation is to be recorded as therein mentioned, and when recorded may be enforced as a county court judgment in England and as a recorded decree arbitral in Scotland. This provision may be somewhat inaccurately worded, but its meaning is clear. The agreement or award determining the amount of compensation is not in any sense a judgment or decree, nor does it create any liability. The liability is imposed by the Act, and the agreement or award determines its amount. When, however, the agreement or award is recorded, the liability may be enforced as though it were a liability under a judgment or decree. Now, where the liability is to pay a weekly sum, not for any definite period, but during incapacity, it could not, even if embodied in a judgment of the county courts in England, be enforced without some further proceeding, in which the Court could be satisfied as to the amount actually due. If in this further proceeding it were alleged by the employer that nothing was due as from a particular date, because on that date the incapacity had determined, it would be the duty of the Court to grant an adjournment so that the dispute as to the duration of the compensation could be referred. If on such reference the arbitrator found that the incapacity had in fact determined on the date alleged, it would be the duty of the Court to refuse to enforce the weekly payment after that date. It appears from the judgment of Lord Shaw, which I have had the advantage of reading, that though the procedure for enforcing or suspending a decree arbitral in Scotland is somewhat different, the same results would follow. There is, therefore, nothing in paragraph 9 of the Second Schedule in any way at variance with the earlier provisions of the Act.

Passing to the 16th paragraph of the First Schedule, it provides that any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum thereinbefore provided, and the amount of payment is, in default of agreement, to be settled by arbitration. This

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paragraph contemplates (1.) that the weekly sum payable has already been ascertained by agreement or arbitration; (2.) that, notwithstanding such ascertainment, a dispute has arisen as to the amount payable under the Act; (3.) that this dispute will be itself settled by a new agreement or arbitration; and (4.) that the settlement of the dispute may involve the weekly payment originally agreed or awarded being ended, diminished, or increased. The process by which the last-mentioned result is to be effected is called a review, but there is, I think, no magic in the word.

In the present case 14*s.* a week was the original amount awarded. Subsequently there was a dispute as to whether it had not ceased to be payable on September 24, 1912, by reason of the incapacity during which alone it was payable having wholly ceased on that date. This dispute was in due course referred, and the arbitrator found that the incapacity had in fact wholly ceased on September 24, 1912. The result seems to be that the weekly payment wholly ceased on September 24, 1912. There has been a review, with the result that the liability to make the payment was ended on that date. If it had been a case of partial incapacity, and the workman had alleged a total incapacity as from September 24, 1912, and claimed 16*s.* instead of 14*s.* a week, and the arbitrator had found in his favour, can it be doubted that the 16*s.* a week would have been payable as from September 24, 1912? I think not. It would be clearly inequitable and contrary to the true intent of the Act so to hold; and it seems to me to be equally inequitable and contrary to the true intent of the Act to hold that a weekly payment continues after the incapacity during which it is payable has wholly ceased. With great respect to the learned judges who were parties to the decision in *Donaldson Brothers* v. *Cowan* (1), it appears to me that they took too technical a view of the 9th paragraph of the Second Schedule and the 16th paragraph of the First Schedule to the Act. They treated the award by which the amount payable was originally settled as though for all purposes, and not only for the purposes of enforcement, it was a judgment or decree, and as if the subsequent arbitration

(1) 1909 S. C. 1292.

proceedings were in the nature of an action to set aside or vary such judgment or decree, whereas in truth the arbitration tribunal set up by the statute is a tribunal for determining and adjusting from time to time, as circumstances alter, the extent and duration of the employer's liability under the Act.

I agree, therefore, that the appeal ought to be allowed.

LORD SUMNER. (1) My Lords, I agree, and would add nothing if it were not that your Lordships are reversing part of a unanimous decision, now five years old, of seven judges of the Court of Session, without having had the advantage, since the respondent does not appear, of any argument in support of it. Out of deference to those learned judges, I think that I ought to state my reasons for differing from them.

The sheriff-substitute of the Lothians and Peebles had before him an application by employers under paragraph 16 of Sched. I. of the Workmen's Compensation Act, 1906, dated November 4, 1912, praying him to review, by terminating them as from September 24 previous, the weekly payments awarded to the workman under the original award. He found as a fact that the workman's incapacity had completely ceased on that day, and in fact, also, the employers had disputed the workman's right to be paid thereafter by the sufficient process of stopping their payments as from that day. The original award, though it is not before your Lordships, may be presumed to have been correctly worded, and so to have provided that the weekly payment was "to continue during the total or partial incapacity of" the respondent, "or until the same be ended, diminished, increased, or redeemed in accordance with the provisions" of the Act. The case states that "a decree of Court" was made thereon, but does not give any date or particulars.

The sheriff-substitute stated in the case two questions of law: "(1.) Was it competent for me to end the respondent's compensation at 24th September, 1912? (2.) Ought I to have ended the compensation at that date?" And he adds that but for the authorities as to the effect of the decree of Court he would have done so. The judges of the Second Division, following the case

(1) Read by Lord Parmoor.

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of *Donaldson* (1), said "No" to the first question and nothing to the second. The appellants submit, and I think rightly, that the answer to both is "Yes."

In connection with the review of an award of weekly compensation there are four occurrences, the dates of which are, or may be, material: (1.) the alteration or cessation of the workman's incapacity in fact; (2.) default of agreement to deal with the compensation accordingly, which involves a contention actually raised inter partes as to the continuance of the original or any payment and the absence of any agreement determining that contention. In point of time either of these occurrences may precede the other. (3.) An application duly made to have the weekly payments reviewed; (4.) an actual decision upon that application. Where, by that decision, a weekly payment has been varied or terminated, a memorandum thereof must be sent under paragraph 9 of Sched. II. to the registrar of the county court, and when it has been registered "the memorandum shall for all purposes be enforceable as a county court judgment," or in Scotland as a "recorded decree arbitral." Not until this has been done has the review resulted in any adjudication; until this has been done the original award, if duly recorded without stay or suspension, is a judicial act still in force. The application for review does not of itself affect or suspend the operation of the award, and it has been laid down in Scotland, though it is otherwise in England, that "if a workman registers a memorandum and by that means gets power of execution, then the only proper way of getting out of the liability which that memorandum imposes is for the employer to end it in the way provided by the statute, viz., by a petition under s. 16, and that he cannot get out of it by any other process such as suspension": per the Lord President in *McEwan* v. *Wm. Baird & Co.* (2) The same proposition, in substance, is to be found in *Fife Coal Co.* v. *Lindsay* (3), *Lochgelly Iron and Coal Co.* v. *Sinclair* (4), and in *Wilsons and Clyde Coal Co.* v. *Cairnduff.* (5) On the other hand, if no memorandum has been recorded, and it

(1) 1909 S. C. 1292.
(2) 1910 S. C. 436, at p. 440.
(3) 1908 S. C. 431.
(4) 1909 S. C. 922, at p. 930.
(5) 1911 S. C. 647, at p. 650.

is proved that the workman has acquiesced in a discontinuance or variation of the payments, then, as was held in *Lochgelly Iron and Coal Co.* v. *Sinclair* (1), suspension of the payments may be granted.

What, then, is the relation of the tribunal of review to the original recorded award? To what date, if any, prior to the date of its actual decision may its order relate? "Review" here does not, of course, mean appeal; for the review may be effected by the parties consensually, and there is, besides, a separate provision for an appeal against the original award. For the purposes of review the arbitrator who decides the second issue has co-ordinate jurisdiction with the arbitrator who decided the first, and often, as in the present case, is the same person. A review is a further arbitration, and, as such, involves a submission which at the same time confers and limits jurisdiction.

Under the Workmen's Compensation Act, 1897, it was held some years ago that the tribunal of review can discontinue or vary the prior payment only as from the date of its actual decision: *Steel* v. *Oakbank Oil Co.* (2) and *Pumpherston Oil Co.* v. *Cavaney.* (3) The ground was that "the judgment still subsisted, notwithstanding an application to review it, until it was reviewed and a judgment in the review pronounced, and ought to have been obeyed, notwithstanding the application for review, so long as it remained unreviewed and unaltered": per Lord Young in the case of *Steel.* (4) "It is not stated" (in paragraph 12 of Sched. I. of the Act of 1897, to which the present paragraph 16 corresponds) "at or from what time the ending, diminution, or increase of the weekly payments is to be made, but it appears to me that upon a sound construction of the section it cannot be assumed to have been intended that the review should take effect at any time prior to the judgment upon the application": per the Lord President in the *Pumpherston Case.* (5) This view never was taken in England. Before either of these cases had been decided *Morton & Co.* v. *Woodward* (6), in the Court of Appeal,

(1) 1909 S. C. 922.
(2) 5 F. 244.
(3) 5 F. 963.
(4) 5 F. at p. 247.
(5) 5 F. at p. 966.
(6) [1902] 2 K. B. 276.

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had laid down the contrary rule, and the decision in the case of *Donaldson* (1) in 1909 definitely abandoned the principle of these two cases. The first question, therefore, is whether they were rightly overruled.

Morton's Case (2) was decided on the principle that the function of the tribunal of review is to arbitrate upon such disputes as may be duly brought before it. Hence the arbitrator is not limited in his jurisdiction to deciding the existence or extent of the workman's incapacity at the date of his award; but may, and, if either party desires it, must, decide it on the date "when the matter was first initiated before the Court," that is, at the date of the application to review, provided that a dispute as to the workman's then condition is then distinctly formulated. As Cozens-Hardy L.J. tersely puts it (p. 282), "The matter which was referred to the learned county court judge, and which he was competent to deal with, was whether at the date of the initiation of these proceedings the incapacity to work had ceased." The argument for the employers in that case did not make it necessary for the Court to consider whether there was jurisdiction to review the weekly payments as at any date anterior to that of the application to review.

Two cases on this subject came before the Court of Appeal in 1909, *Upper Forest and Western Steel and Tinplate Co.* v. *Thomas* (3) and *Charing Cross, Euston and Hampstead Ry. Co.* v. *Boots*. (4) In both the arbitrator terminated the weekly payment on review as from a date anterior to that of the application for review. In neither did the application state a date for the workman's alleged recovery. In the first case, on the workman's application to record, the county court judge, finding that it was opposed on an allegation that the incapacity had ceased, recorded the memorandum, but stayed execution to give time for an application for review. No exception seems to have been taken to this in the Court of Appeal, and the cases of the *Fife Coal Co.* (5) and of the *Lochgelly Co.* (6) were not cited. The Court of Appeal unanimously decided that on the form of

(1) 1909 S. C. 1292.
(2) [1902] 2 K. B. 276.
(3) [1909] 2 K. B. 631.
(4) [1909] 2 K. B. 640.
(5) 1908 S. C. 431.
(6) 1909 S. C. 922.

the application to review the arbitrator had exceeded his jurisdiction, for "it was not referred to him to ascertain what was the state of the injured man at a previous date." The earliest competent date was, therefore, the date of the initiation of the review. The question whether, if the matter had been duly referred, he could have decided that the incapacity had ceased at a previous date was deliberately left open. In the second case the Court, now somewhat differently constituted, adhered to its former decisions that the arbitrator on a review cannot go outside the submission, and that he can review as from a date anterior to that of his own decision. Cozens-Hardy M.R. intimated distinctly the opinion that "if there is a formulated dispute as to a workman's incapacity at a particular date, it is competent to the arbitrator to decide that dispute" (p. 644). He did not expressly put the case when the date particularized is anterior to the application for review itself, but there can be little doubt that his opinion was meant to cover that case. Kennedy L.J. (p. 650) was also favourably inclined to that jurisdiction. Here again the county court judge, when recording the memorandum, had simultaneously stayed execution pending an application to review, and the majority of the Court of Appeal, expressing no doubts of its propriety, found authority for this course in paragraph 9 (*b*) of the Second Schedule. Buckley L.J. held that the order to record the agreement ought to have been made, but so that the record should not be enforceable as a judgment under Sched. II., paragraph 9. In other words, an order "that execution of the order for registration of the agreement be stayed" is right; an order "that execution of the judgment for enforcement of the agreement shall be stayed" would be wrong. He further considered that the facts sufficiently raised the question of the arbitrator's jurisdiction to terminate as from a date prior to that of the application to review, and that the form of the application also was adequate. Accordingly he held definitely that, as from such prior date, there was jurisdiction to decide that the workman was entitled to nothing. He expressly says "There is nothing in the statute to prevent it" (p. 648), an opinion in which I concur.

It is to be noted that the unanimous judgment of the Court

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continued the stay imposed in the county court, which, whatever its form, effectually prevented the workman from getting payment, as from the date on which his incapacity was alleged to have ceased until the date of the employer's application to review, without making a further application for its removal, on which application cessation of incapacity prior to the date of the application to review could be alleged in answer and proved by the employer.

The conflict between the English and the Scotch decisions had attracted such attention that already in 1908 the question was mooted of bringing it before the Full Bench in order to decide whether the cases of *Steel* (1) and of *Pumpherston* (2) should stand (see *Southhook Fire-Clay Co.* v. *Laughland* (3)), but all that was then decided was that if no memorandum had been recorded but mere voluntary payments had been made, there was nothing in the nature of an operative decree to stand against the fullest exercise of the power of review; and here the Court appeared to recognize that, in terms, paragraph 16 itself does not limit that exercise at all. This was the state of the authorities when *Donaldson's Case* (4) fell to be decided.

The dates in that case are important. The workman got the agreement recorded on October 5, 1908. On October 24, 1908, as the sheriff-substitute found, his incapacity entirely ceased. As from that date the employers had made no payment, and when, on December 28, the workman charged them to make payment, they on December 30 brought a suspension of this charge. The Lord Ordinary refused the note of suspension and the employers reclaimed. Meantime the sheriff-substitute had heard the employers' application to review, which also was dated December 30, and had stated a case with this question of law for the opinion of the Court: "Should the compensation payable to the respondent have been ended on the date of my judgment, viz., 23rd February, 1909, or on the date on which the incapacity of the respondent had ceased, viz., 24th October, 1908?" The stated case and the reclaiming note in the suspension were heard together. Upon the reclaiming note the Court, following the

(1) 5 F. 244.
(2) 5 F. 963.
(3) 1908 S. C. 831.
(4) 1909 S. C. 1292.

case of *Lochgelly* (1), held that the suspension was rightly refused by the Lord Ordinary. The Court, further, overruling the cases of *Steel* (2) and *Pumpherston* (3), held that the date of the sheriff-substitute's judgment was not the date at which the payment should have been terminated, but, instead of finding in terms of the question of law stated, directed that the compensation should have been ended as on the date of the application to review, and so remitted the case to the sheriff-substitute to proceed as accords.

Part of the reasoning of the Court appears to have been that until the application to review is made there can be no "formulation of a dispute," to use the phrase which originated with Collins M.R. in *Morton & Co.* v. *Woodward* (4), except in a sense so wide that it would include a mere case of cessation of payment by an employer, which, unless the workman acquiesces in it or the employer acts from carelessness or want of money, shows of itself that the parties are in difference about it; that this would amount to the employer's "determining at his own hand" when incapacity ceases, by taking the law into his own hands and disregarding the terms of a recorded memorandum; and that he is bound to continue to pay in accordance with it at his peril, unless and until on an application to review he gets the weekly payments altered.

My Lords, it is to be regretted that the Court of Session only had the *Charing Cross Case* before it in the form in which it is reported in 25 Times Law Reports, 683, a form which, while stating the reasons of the Master of the Rolls at length, fails to report the other judgments at all, and gives a most meagre and unsatisfactory note of their effect. It is evident that the learned judges of the Court of Session felt some difficulty in apprehending the reasoning of the Court of Appeal in that case, and I cannot but think that a full report, and particularly the observations of Buckley L.J. at p. 648 of the *Law Reports*, [1909] 2 K. B., might probably have led them to a different conclusion.

So far as the decision in the case of *Donaldson & Co.* v.

(1) 1909 S. C. 922.
(2) 5 F. 244.
(3) 5 F. 963.
(4) [1902] 2 K. B. 276.

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Cowan (1) overruled the cases of *Steel* (2) and of *Pumpherston* (3), and held that the review might go back to a date anterior to the decision on the review, it seems to me that it was indubitably right, and that *Morton & Co.* v. *Woodward* (4), too, was rightly decided. There is a marked difference between the scheme of the Workmen's Compensation Acts, 1897 and 1906, and the Employers' Liability Act, 1880. Sect. 1 of the latter provided that "where . . . . personal injury is caused to a workman . . . . the workman . . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman." That right was to be asserted and those remedies pursued by action brought in the county court. The Workmen's Compensation Act provides otherwise. Sect. 1, while keeping alive an employer's pre-existing civil liability, declares that, "if . . . . personal injury . . . . is caused to a workman . . . . his employer shall . . . . be liable to pay compensation," and sub-s. 3 provides that, "if any question arises in any proceedings" not only as to liability, but also "as to the amount or," mark this, "duration of compensation under this Act, ... the question, if not settled by agreement, shall be . . . . settled by arbitration, in accordance with the Second Schedule to this Act." As my noble and learned friend Lord Kinnear says in the case of *Pumpherston* (5), "Procedure under the Workmen's Compensation Act is not ordinary litigation, or indeed litigation at all. The right given to the workman is a new and statutory right, to be expiscated by arbitration, and not by an action-at-law; and we must consider what the statute says with reference to the way in which it may be determined or modified."

Now, although there is provision for giving effect to the arbitrator's various decisions as if they were judgments of a Court, the awards themselves are not judgments, and a special paragraph (9 of Sched. II.) is required to enable them, after being duly recorded, to be enforced as if they were. That enforcement in its turn is affected by the provfsion for review. The statute does not

(1) 1909 S. C. 1292.
(2) 5 F. 244.
(3) 5 F. 963.
(4) [1902] 2 K. B. 276.
(5) 5 F. 963, at p. 970.

contemplate a judgment for a sum of money recovered once and for all as compensation for the cause of action, in which judgment the cause of action merges. In the case of an injured workman it creates a right in the workman and a liability in the employer to receive and make respectively a weekly payment during incapacity, which weekly payment may be reviewed, and on such review be ended, diminished, or increased. This right persists instead of merging in the award when made, as it would do in a judgment when recovered upon an ordinary cause of action; and the employer continues liable not simply to perform that award, but to pay compensation during the workman's incapacity. Again, the right to the weekly payments does not belong to the workman without restraint, as his general choses in action would do. This right is dependent on continued residence in the United Kingdom, subject to one exception, and it cannot be assigned, charged, or attached, nor does it pass by operation of law (paragraph 19 of Sched. I.). So far does this go that, although the workman can agree with his employer for the redemption of the weekly payments by a lump sum, that lump sum itself he can neither assign nor charge. It is therefore plain that the ordinary incidents of a judgment in an action do not attach to the decree arbitral on the original award, nor, in so far as concerns the fluctuations in the condition of the workman's health from time to time, does the original award operate as res judicata to estop either party from claiming to reopen it after a change of circumstances and on fresh materials: *Sharman* v. *Holliday & Greenwood*. (1) The question how long and how far the prior decree continues to be "operative" and "subsisting" depends entirely on the construction of paragraph 16. To ask how the decree or review can divest the vested right to payments which are due, overdue, or payable under the original award is only a different way of stating the same thing. There is nothing in the mere language of that paragraph to limit the power of review in respect of the date at which the decision on the review may begin to operate. The object of the power of review obviously is to enable the tribunal to adjust the payment to the incapacity from time to time, so that, as far as possible and for

(1) [1904] 1 K. B. 235.

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the sake of justice to both parties, the amount payable may increase or diminish as the incapacity increases and diminishes, and so that both may terminate together.

My Lords, upon the second question, I think the case of *Donaldson* (1) cannot be supported. The Court apparently thought that the Legislature meant the injured workman to get his payments regularly. So I should think it did. It was then thought that a retrospective review, not restricted to the date of the application, would encourage the employer to stop the payments as soon as he suspected that the workman's health had mended, and would be inconsistent with the decision in the case of *Lochgelly* (2) above stated. The first reason assumed that a payment once made could not be recalled, however far the review might relate back, and that an employer would be tempted to stop payments at once, since otherwise, though he might succeed on the review, some part of his success would be barren. The second assumed that the paragraph which provides the right of review was concerned with the means of enforcing a recorded award, a matter for which the statute makes adequate provision elsewhere. As to the latter, if the workman fails to get the award registered, and then to enforce it, he must abide the consequences of his own want of diligence. Those consequences are not to be cured by attaching to the right of review a restriction which is not expressed. In the former case the employer could always arrive at the same result by making his application to review synchronize with his cessation of payment; and thus the construction adopted in *Donaldson's Case* (1) achieves nothing. For my part, I think there is here no question for decision, either of the employer's right to recover from the workman sums paid between the date of his restoration to health and that of the employer's application for review, or of the exact procedure to be adopted in order to regularize the cessation of such payments pending a decision on review. Regard must be had in England to the practice established as to county court judgments, and in Scotland to the special incidents of procedure which attach to the "decree arbitral" as a "recorded decree." I am glad to think that a procedure may be adopted which in effect will leave the

(1) 1909 S. C. 1292. (2) 1909 S. C. 922.

working of the Act identical and uniform in both countries, and I am clearly of opinion that both the scheme and the language of the Act itself suffice to prevent any inference being drawn adversely to the full retrospective effect of the review, from the provision that the award is to have the force of a "recorded decree arbitral." So, too, I think your Lordships are not now concerned with the other assumption, that the employer can never recover from the workman payments once actually made. On that topic contrary expressions of opinion are to be found, on the one hand by the President and Lord Adam in the *Pumpherston Case* (1), on the other by Cozens-Hardy M.R. and Fletcher Moulton and Farwell L.JJ. in *Hosegood & Sons* v. *Wilson*. (2) I have no opinion to express about it, though I apprehend that the ordinary rules about money paid voluntarily, or under compulsion of law, or under mistake of fact, will suffice to decide the point.

When the language of the Legislature is clear, suppositions as to the policy of the Act can rarely assist in its interpretation. Here, however, the argumentum ab inconvenienti is not in favour of, but overwhelmingly against, the decision on this point in *Donaldson's Case*. (3) If the decision stands, workman as well as employer must, in self-defence, apply for review at the first inkling of any change in the former's incapacity. Each will await the effect of time and resort to repeated examination or prolonged observation at his peril. Each will recoil from negotiating with a view to a settlement of the dispute by consent for fear of prolonging the interval during which the original award must be rigorously implemented, no matter how the workman's health may have altered for better or for worse in the meantime. Each will hasten to claim a review as early as possible, in order that the fruits of success may be as ample as possible. It is to be presumed that the Legislature foresaw and provided for these contingencies. One would expect the power of review to be expressed without limitation in order that the workman's incapacity, on which his right to compensation depends, may be followed as closely as possible in its fluctuations by an award for

(1) 5 F. 963, at pp. 966 and 968. (2) [1911] 1 K. B. 30.
(3) 1909 S. C. 1292.

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an adequate payment, and so it is; in my opinion, the power is so expressed.

The problem is not a new one, though the expression "review" is, I think, new in this kind of legislation. Under the Matrimonial Causes Acts, 1866, 1878, and 1884, various provisions were made for weekly or other periodical payments by a husband to a wife, and it was foreseen that the circumstances of either parties, or both, might so change as to require those payments to be from time to time increased, diminished, or suspended. To effect this object, power was given to the Court which ordered the payment to vary it by further order as under the circumstances should be just. So here, the Legislature has dealt with a similar necessity in a similar way, and, making the changes incidental to arbitration, it gives to the arbitrator full control over the weekly payments by means of review. How the dispute is to be formulated, how the absence of agreement to settle it is to be proved, how it is to be submitted to arbitration, and how it is to be notified to the other side, are questions belonging to a different category altogether, which need not now be discussed.

My Lords, I think that in the present case the arbitrator had full power to terminate the payments as from the date at which he found that incapacity had ceased; that the appeal should be allowed and the judgment below should be set aside; that the questions in the case stated should both be answered in the affirmative, and that the case should be remitted to the sheriff-substitute to proceed as accords.

LORD PARMOOR. My Lords, I agree. The facts in this case are simple. The question for decision is the construction of certain statutory provisions under the Workmen's Compensation Act, 1906. The respondent in August, 1912, was awarded under the Act a sum of 14*s*. per week in respect of injuries by accident arising out of and in the course of his employment as a dock labourer with the appellants. In accordance with this award, the appellants paid compensation to the respondent up to September 24, 1912, at which date a dispute arose and the payments were discontinued. On November 4, 1912, the appellants presented an application for reviewing the compensation

payable to the respondent, averring (inter alia) that the respondent had completely recovered from his incapacity by September 24, 1912, and asking (inter alia) that the payment of compensation should end as from that date. The sheriff-substitute found as a fact that on September 24, 1912, the respondent had recovered completely from his incapacity for work, but held that it was not competent for him to end compensation at that date, since by doing so he would be disturbing a decree of the Court as at a date when there was no proper application enabling this to be done. Had it been competent for him to do so he would have ended the compensation at the date at which the incapacity of the respondent had ceased. The questions of law for the opinion of the Court are: (1.) Was it competent for the sheriff-substitute to end the respondent's compensation on September 24, 1912? (2.) Ought the sheriff-substitute to have ended the compensation at that date?

The case came on for hearing before the Second Division of the Court of Session. The first question of law was answered in the negative. No answer was given to the second question, and the determination of the sheriff-substitute was affirmed. From this interlocutor the appellants appealed. The Second Division of the Court of Session in giving their decision held that they were bound by the case of *Donaldson Brothers* v. *Cowan* (1), which it was not possible to distinguish. The question, therefore, is whether that case was rightly decided.

The general scheme of the Workmen's Compensation Act, in cases where total or partial incapacity for work results from injury, is to be found in s. 1, sub-s. 1, and Sched. I., paragraph 1 (*b*). In such cases a weekly payment is provided as compensation during the incapacity of the workman, that is to say, during the period of time for which the workman is disabled from earning wages, either wholly or in part. For all ordinary cases an applicable form of award is given in the appendix to the Workmen's Compensation Rules. This form, following the scheme of the Act, orders that the weekly payment for compensation shall continue during the total or partial incapacity of the workman, or until the same shall be ended, diminished,

(1) 1909 S. C. 1292.

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increased, or redeemed, in accordance with the provisions of the Act. In the present case it was said that the award was in the ordinary form, so that under the terms of the award the weekly payment as compensation would only be payable during the total or partial incapacity of the respondent, but if a dispute arises whether and at what date total or partial incapacity has ended, this can only be determined under the statutory procedure in the Act. This procedure was put into operation at the instance of the appellants.

When an award of compensation has been made, a memorandum thereof is required to be recorded under Sched. II., paragraph 9. In the present case a memorandum of the weekly payment due to the respondent was duly recorded, and thereupon such memorandum became enforceable as a recorded decree arbitral. In the same way a memorandum of variation in any weekly payments can be recorded, but to obtain such variation the statutory requirements must be followed. The sheriff-substitute in refusing to end the compensation on September 24, 1912, at which date he found that the respondent had recovered complete capacity for work, based his decision on the ground that to do so would be to disturb a decree of Court at a date when there was no proper application to enable this to be done.

My Lords, in my opinion, there is no ground for holding that the recorded memorandum is a decree of Court incapable of retroactive alteration by the sheriff-substitute. Whether the recorded memorandum is to be regarded as a decree, or simply as a record of the terms of payment enforceable as a decree of Court, it is by express statutory provision open to variation and review under statutory procedure if conditions change.

The statutory requirements to be followed when it is desired to review any weekly payments ordered to be paid in a recorded memorandum are to be found in Sched. I., paragraph 16. It is enacted that in default of agreement, the ending, diminishing, or increasing of weekly payments shall be settled by arbitration under the Act. In the present case a dispute had arisen as to the continuance of the incapacity of the respondent, the appellants alleging that the incapacity of the respondent had ended

on September 24, 1912, and ceasing to make payment from that date. There may be a difficulty in some cases in deciding at what date a dispute has arisen so as to determine the ambit of the jurisdiction of the arbitrator; but I think it is clear that such dispute did arise in the present case at the date of the cessation of the weekly payment. No agreement was made, and, in default thereof, the appellants applied to the sheriff-substitute, averring that the respondent had at September 24, 1912, completely recovered from his accident, and asking that the weekly payment should be ended as from September 24, 1912. It was clearly within the jurisdiction and duty of the sheriff-substitute to determine the dispute as to the date at which the incapacity of the respondent had ceased, and on this point he found in favour of the appellants. The further question is whether, having found the date in favour of the appellants, it was competent for him to alter the recorded memorandum in accordance with the finding. This further issue was undoubtedly submitted to him in the application to review. In my opinion it was within his power and jurisdiction to entertain it and he had competent authority to alter the time in the recorded memorandum by ending the compensation payable on September 24, 1912, this issue having been properly submitted to him under the statutory procedure. There is no limitation of time expressed in the statute and no reason why such a limitation should be inferred. I apprehend that the question is simply one of construction, and that considerations based on policy are irrelevant. I agree with the opinion expressed by Buckley L.J. in the case of *Charing Cross, Euston and Hampstead Ry. Co.* v. *Boots* (1), that there is nothing in the statute which would prevent the sheriff-substitute going back to the relevant date, and that the question is only one of what are the issues which have been presented to the tribunal in the case in which the decision is invited.

My Lords, in the case of *Donaldson Brothers* v. *Cowan* (2), a case of great authority, which was heard by seven judges, it was held that the sheriff-substitute had a power of retroactive decision, but limited to the date of the application to him. This limitation

(1) [1909] 2 K. B. 640. (2) 1909 S. C. 1292.

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is adopted on the ground that when compensation is once fixed the only way to alter it is that provided by the statute, an application to vary. No doubt the only way to alter compensation is by the statutory procedure, but the tribunal to which the application is made is not thereby placed under any disability to determine the whole dispute referred to it, including the alteration of the recorded memorandum so as to accord with its determination on questions of fact. Assuming, as the Court of Session held, that there may be retroactive alteration in a memorandum enforceable as an absolute arbitral decree, I am unable to find any ground for limiting the period for retroactive alteration to the date of the application to review, although differing with hesitation from so authoritative a judgment. In England the recorded memorandum under the Act is enforceable as a county court judgment, but this difference does not, in my view, in any way affect the power of the arbitration tribunal to which the application for review is made.

My Lords, I desire to express no opinion on questions of procedure which do not arise in the present case. In my view both questions should be answered in the affirmative, and the appeal allowed.

Interlocutor of the Second Division of the Court of Session in Scotland reversed and the questions of law stated by the sheriff-substitute answered in the affirmative. No costs here or in the Court of Session.

Lords' Journals, May 14, 1914.

Agents for appellants: *Botterell & Roche, for Boyd, Jameson & Young, W.S., Leith, Edinburgh.*

[HOUSE OF LORDS.]

WEBBER (PAUPER) . . . . . APPELLANT;

AND

WANSBOROUGH PAPER COMPANY, LIMITED . . . . . RESPONDENTS.

H. L. (E.)*
1914
June 29.

Employer and Workman—Compensation—Seaman—Accident arising out of and in Course of Employment—Transit from Ship to Shore—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A seaman on board a ketch, which was lying in W. harbour, was employed in unloading the cargo. When the ketch was at W. he slept on shore. After his work for the day was finished he left the ketch by a plank, one end of which rested on the ketch and the other on a rung of an iron ladder permanently fixed to the quay and belonging to the harbour authorities. Whilst ascending the ladder he slipped and fell into the harbour and injured his foot. The county court judge found that the ladder was the proper means of access to the ketch and that the accident arose out of and in course of the employment:—

Held, that there was evidence to support this finding.

Cook v. *Owners of S.S. Montreal* (1913) 6 B. W. C. C. 220 distinguished.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal setting aside an award made by the county court judge of Somersetshire under the Workmen's Compensation Act.

The appellant applied for compensation in respect of an injury sustained to his foot by an accident which occurred on June 8, 1912.

The appellant was a seaman employed on board the respondents' ketch *Charlotte*, which traded between Watchet and other Bristol Channel ports. When the ship was at Watchet the appellant slept on shore. On the day of the accident the ketch was lying in Watchet Harbour moored against the quay and was connected with the quay by a plank, one end of which rested on the ketch and the other end of which rested on one of the rungs of an iron ladder permanently fixed to the quay. The ladder belonged to the harbour authorities. The appellant had been employed during the day, partly on board and partly on the

* *Present:* VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

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quay, in helping to unload the ketch, and after the cargo was discharged he went from the quay to the ketch and put on the hatches, as was his duty. He had then finished his work for the day, which was a Saturday, and in the normal course he would not be required to go on board again until the Monday; but he might have been wanted again if the ship had had to be moved from her moorings. After putting on the hatches—it being low tide—he left the ketch by the plank, which he crossed in safety, but after he had gone a step or two up the ladder he slipped and fell into the harbour and his foot was seriously injured.

The learned county court judge found that the ladder was the proper means of access to the ketch. In his opinion the ownership of the ladder did not as a matter of law conclude the question whether the accident arose out of the man's employment, and upon the particular facts of this case he came to the conclusion that the accident to the appellant did arise out of and in the course of his employment. He therefore awarded him compensation.

The Court of Appeal (Cozens-Hardy M.R., Kennedy and Swinfen Eady L.JJ.), being of opinion that the case was governed by *Cook* v. *Owners of S.S. Montreal* (1), allowed the appeal and set aside the award.

Douglas Knocker and *Edgar T. Dale*, for the appellant. *Cook* v. *Owners of S.S. Montreal* (1), by which the Court of Appeal considered themselves bound, is distinguishable because the dolphin or floating platform in that case was a structure capable of accommodating a large number of people and was treated as part of the quay. In the case of a ladder only one man can go up at a time. *Kitchenham* v. *Owners of S.S. Johannesburg* (2) is also distinguishable because there the presence of the man in the water was not accounted for, but the appellant relies upon the general principles laid down by Lord Moulton in his judgment in the Court of Appeal in that case. The test is whether the risk is one due to the means of access to the ship: *Moore* v. *Manchester Liners*. (3) Although the appellant had finished his work for the day his employment did not cease till he actually got on to the quay: see

(1) 6 B. W. C. C. 220. (2) [1911] 1 K. B. 523; [1911] A. C. 417.
(3) [1909] 1 K. B. 417; [1910] A. C. 498.

Gane v. *Norton Hill Colliery* (1), which was approved by Lord Sumner in *Cook* v. *Owners of S.S. Montreal.* (2) The county court judge has found as a fact that the accident arose out of and in the course of the employment, and there being evidence to support that finding it is conclusive.

Alec Neilson and *G. P. Langton*, for the respondents. The basis of the respondents' case is that the ladder forms part of the quay. Suppose instead of the fixed ladder there had been a flight of steps, could it then have been said that the accident arose out of and in the course of the man's employment? But there is no difference in principle between the two cases. The duty of the respondents was to provide a safe mode of access to the quay, and there their duty ends. The ladder was not a mode of access provided by the ship but was part of the quay, and it belonged to the harbour authorities. There is no evidence that this ladder was specifically used for the purposes of the ship. It is said that the question at issue is a question of fact, but it is really a question of mixed fact and law, and the judge has drawn an inference of law from a finding of fact as to which there was no evidence.

Douglas Knocker replied.

VISCOUNT HALDANE L.C. My Lords, normally in a case in which this House is about to differ from the Court of Appeal it takes time to consider its judgment and to formulate it, but the present case appears to me, and I think it appears to your Lordships who are present, to be one which is governed partly by what the county court judge has found, and partly by a principle which has been laid down by the Court of Appeal itself and has been affirmed in this House. I think the Court of Appeal would probably have come to a different conclusion from that which it actually reached had it not been that it conceived itself bound by the case of *Cook* v. *Owners of S.S. Montreal* (2), a case which I feel obliged to say is not one which can be relied on as governing the case before us.

My Lords, here the plank which was used for the purpose of enabling the seaman to leave the ship was a plank which was

(1) [1909] 2 K. B. 539. (2) 6 B. W. C. C. 220.

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applied to the rung of a ladder descending to the side of the quay and forming a part of the quay belonging to the dock authority, but none the less may it have been that, as the county court judge found, "the ladder in this case was the means of access to the ship, and was the proper means of access. This is the crux of the case, Webber would not have been on that ladder unless it had been for his employment." He explains what he means in his preliminary note. "Ladder was at time of accident means of access to ship and nowhere else and proper means of access. As much part of access as plank." Under those circumstances, my Lords, I think the county court judge must be taken to have found that in point of fact the ladder for the occasion on which the seaman had to get to the quay was something specifically appropriated for that purpose by the employers. If so, then the test which was laid down by Lord Moulton when he was in the Court of Appeal, and which was afterwards adopted by this House, applies. What Lord Moulton laid down in the Court of Appeal in *Kitchenham* v. *Owners of S.S. Johannesburg* (1) and what was afterwards adopted by this House was enunciated by him in these words: "I do not think it difficult to lay down the general principle by which our decisions ought to be guided. The return to the ship is in the course of his" (the man's) "employment, but the risks do not become risks arising out of his employment until he has to do something specifically connected with his employment on the ship. Thus, if the risk is one due to the means of access to his ship, as in *Moore* v. *Manchester Liners* (2), the accident is rightly said to arise out of his employment; but if the accident is shewn to arise from something not specifically connected with the ship it cannot be said to arise out of his employment. I do not think that the dividing line is when he actually touches the ship or the special means of access thereto. For instance, if it was shewn that when the sailor returned to the ship there was a dense fog and that in trying to find the gangway, which I will suppose was not lighted, he fell in the water and was drowned, I think that the accident would arise out of his employment. But if all that is shewn is that it occurred during his return to the ship but while he was still on the shore,

(1) [1911] 1 K. B. 523; [1911] A. C. 417. (2) [1910] A. C. 498.

and before he had taken any specific step towards getting on board the vessel, I think that it would not thereby be established that the accident arose out of his employment."

Now, my Lords, that passage is adopted in the judgment of Kennedy L.J. in the present case, and it may well be that not only he but his colleagues would have taken a different view of its application but for the case of *Cook* v. *Owners of S.S. Montreal.* (1) In that case the ship was moored to a dolphin connected with the quay by means of a permanent bridge. The dolphin was not railed and was badly lighted. The seaman got safely on to the dolphin, but fell between it and the quay and was drowned, and it was held that the accident did not arise in the course of his employment, the reason being that the dolphin was treated as being as much part of the land as the quay itself in that case. Obviously the dolphin was a large structure, in some respects in its arrangement not unlike the quay itself, and it is a very difficult thing to say of the dolphin to which the public had access, and which no doubt they frequented, and on which people might be for many purposes, that it was in the same position as a ladder that has been specifically appropriated by means of a plank as the access on the occasion to the quay.

That being so, and the law being, as Buckley L.J. points out in the case of *Cook* v. *Owners of S.S. Montreal* (1),—that "in the obligations contractually existing between master and servant it is part of the duty of the master to afford the workman when he is dismissed reasonable facilities for leaving the place of employment, and that if the servant is injured whilst availing himself of those facilities the master may be liable,"—the conclusion in this case seems to me to be a very simple one. I see no reason why we should disturb the conclusion come to as to a point of fact by the county court judge. It may be that there is a certain amount of inference in his finding as to the facts. But that does not prevent us, as long as the learned county court judge had evidence on which to act, and has not misdirected himself on points of law, from accepting what he has said, in accordance with the principle that has been laid down frequently in this House. Of course, if *Cook's Case* (1) had really governed the present

(1) 6 B. W. C. C. 220.

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circumstances, then the learned county court judge must be taken to have misdirected himself, but I have already indicated to your Lordships why in my opinion that is not so. Therefore I am of opinion that the learned county court judge was right, and that the Court of Appeal were wrong in disturbing his finding, and I move that the judgment of the Court of Appeal be reversed and that of the county court judge restored. The appellant must have his costs here and in the Court of Appeal, the costs in this House to be taxed according to the usual rule in the case of an appellant who sues in forma pauperis.

LORD SHAW OF DUNFERMLINE. My Lords, I concur.

LORD MOULTON. My Lords, this case is in my view eminently a border line case. I do not think that there is any doubt as to the principles of law that we ought to apply. They may be said to be two in number. One is that which was laid down in the *Kitchenham Case* (1), and the other is that which was laid down by Buckley L.J. and has been referred to by the Lord Chancellor in his opinion, namely, that an employer is bound to give reasonable means of access and exit to his workman.

If I thought that the county court judge was of opinion that the plank alone was a reasonable mode of access and exit for the workman I should have thought that it was not our business to disturb his finding, and that this appeal must fail. But on carefully examining his findings I think that he considered that the ladder on which the plank landed the workman was not such a safe portion of the quay that the responsibility of the employer ceased when he had put the workman there.

My Lords, nothing that I say must be supposed to mean that I think that under no circumstances would it be sufficient to land a sailor on one of those vertical ladders fixed to the sides of docks with which we are so well acquainted. To a sailor that means of exit ought to be almost as safe as walking on the highway. But I do not think that it follows necessarily that it is so. If the person had not been a sailor, I should have thought that the probability was that it was not so. Accordingly in this case

(1) [1911] 1 K. B. 523; [1911] A. C. 417.

I see no reason for thinking that the learned judge of the county court misdirected himself in finding that the ladder was part of the access to the vessel, for the sufficiency and safety of which the employers were liable. If that be so, there is an end of the case because the accident occurred before he was outside the scope of his employment, and therefore I agree with the motion which has been made by the Lord Chancellor, that this appeal should be allowed.

Order of the Court of Appeal reversed and award of the county court judge restored. The respondents to pay the costs in the Courts below and the costs of the appeal to this House, the costs in this House to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, June 29, 1914.

Solicitor for appellant: *E. E. Baron Reed, for C. P. Clarke & Co., Taunton.*

Solicitors for respondents: *Holman, Birdwood & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* 1914 June 26.

WILLIAM THOMAS & SONS . . . . . Appellants;

AND

HARROWING STEAMSHIP COMPANY . . Respondents.

Charterparty—Lump Sum Freight—Loss of Ship and Part of Cargo by Excepted Peril—Delivery of Part of Cargo—Right of Shipowner to Freight.

The plaintiffs chartered their ship to the defendants to load a cargo of timber and carry it to a named port for a specified lump sum as freight, payable on right delivery of the cargo. The charterparty contained the usual exception of perils of the seas. The ship arrived with her cargo on board outside the port of discharge, when owing to heavy weather she was driven ashore and became a total loss. Part of the cargo was washed ashore and was afterwards collected on the beach by the directions of the master and deposited on the dock premises, the residue being lost by the perils of the seas. In an action to recover payment of the lump sum freight:—

Held, that the plaintiffs, having delivered so much of the cargo as they were not excused by the excepted perils for not delivering, had performed their contract and earned their freight, notwithstanding that the ship had not completed her voyage and that the portion of the cargo delivered had been so delivered otherwise than by the ship stipulated for.

Decision of the Court of Appeal [1913] 2 K. B. 171 affirmed.

Appeal from an order of the Court of Appeal (1) affirming a judgment of Pickford J. (2)

The appellants were the charterers and the respondents were the owners of the steamship *Ethelwalda*.

By a charterparty dated September 1, 1911, and made between Messrs. Robert Harrowing & Co. for the respondents and the appellants, it was agreed that the steamship should proceed to a place in the Uleaborg district in Finland and there load a full and complete cargo of pit props. "The steamer to carry a full and safe deck load, at charterers' risk, not exceeding what she

* *Present:* Viscount Haldane L.C., Lord Shaw of Dunfermline, Lord Moulton, and Lord Parmoor.

(1) [1913] 2 K. B. 171. (2) [1912] 3 K. B. 321.

can reasonably stow and carry, over and above her tackle, apparel, provisions and furniture; and being so loaded shall therewith proceed to Port Talbot, a dock as ordered, or so near thereunto as she may safely get, and deliver the same, always afloat, on being paid freight as follows:—A lump sum of 1600*l.* (say sixteen hundred pounds) in full of all port charges and pilotages, in consideration of which owners place at charterers' disposal the full reach of steamer, on and under decks, including spare bunkers, if any."

The charterparty contained the usual clause of exceptions including perils of the seas, and it provided that the freight should be "paid in cash without discount (less freight advance, if any) on unloading and right delivery of the cargo."

The ship loaded her cargo and arrived at Port Talbot on October 29, 1911, but being unable to get into dock on that day she anchored off the port. On the next morning her anchors dragged and her cables parted owing to the perils of the sea and she drove ashore outside the breakwater of the entrance channel to the dock and became a total loss. The deck cargo was swept off by the seas and a good deal of it was washed ashore. The cargo in the hold was also gradually washed out, and a substantial part of this cargo also found its way to the beach. At the instance of one Captain Barge, the agent at Port Talbot of the Salvage Association, a firm of Jenkins & Co. began collecting the cargo so washed ashore. At Captain Barge's suggestion Mr. Jenkins approached the master of the ship, and eventually the master on behalf of the respondents entered into a contract with Jenkins & Co. that they should save as much of the cargo as they could and place it in the custody of the Port Talbot Dock Company pending delivery to the appellants on payment of freight. In pursuance of this contract Jenkins & Co. saved and placed in the custody of the dock company about two-thirds of the cargo. The remainder was lost by perils of the sea. To assist in getting the cargo out of the steamer's holds holes were cut or blasted in her side. The appellants claimed delivery while refusing to pay freight or other charges on the cargo. The dock company accordingly retained possession of the cargo pending payment of freight and their own charges for warehousing.

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In December, 1911, the respondents commenced the present action against the appellants, claiming 1347*l.* 9*s.*, being the amount of the lump sum freight less the amount advanced at the port of loading, or, alternatively, a reasonable amount of freight and the expenses incurred in forwarding the cargo to the dock, or, in the further alternative, a reasonable amount of salvage for saving the cargo.

In January, 1912, the appellants commenced an action against the dock company to obtain delivery of the cargo, and in that action Scrutton J. made an order that on payment by the appellants of 1347*l.* 9*s.* into a bank in the joint names of the respective parties' solicitors the dock company should release the cargo, which they accordingly did.

In the action for freight Pickford J. gave judgment for the respondents for the amount claimed, and his judgment was affirmed by the Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.).

1914. June 25, 26. *Sir R. Finlay, K.C.*, and *Leck, K.C.* (with them *Maurice Hill, K.C.*), for the appellants. A lump sum charterparty contemplates one entire service and is a contract for the use and hire of the ship for the whole voyage. Therefore if the voyage is not completed the lump sum is not payable. To earn the freight the ship must arrive at the port of destination and must unload and deliver the cargo. There has been here no arrival of the ship and no delivery of the cargo, and, consequently, the condition upon which the lump sum became payable has not been performed. The ship was wrecked before arriving at the port of destination and part of the cargo was washed ashore by the force of the wind and waves. That is not delivery under the contract, for by the wreck the shipowner had lost control and possession of the cargo. The cargo arrived on the coast as a wreck within ss. 518 and 519 of the Merchant Shipping Act, 1894. If the ship had delivered two-thirds of the cargo and one-third had been lost by perils of the sea, then, no doubt, the lump sum would have been payable, but there must be a right and true delivery of the cargo having regard to the excepted perils. The excepted perils are for the shipowner a shield

and not a sword; they are not a substitute for performance: *Williams & Co.* v. *Canton Insurance Office.*(1) If the ship is wrecked on the way, then, subject to any question of transhipment, the owner of the goods may take them because they are his own, and he will not be liable to pay any part of the freight: *Cook* v. *Jennings.*(2) The arrival of the ship being a condition precedent to the payment of the freight, if the ship fails to arrive no claim arises on a quantum meruit; it is all or nothing: *Ritchie* v. *Atkinson*(3); *Cutter* v. *Powell*(4); *Appleby* v. *Myers*(5); *Forman & Co. Proprietary* v. *Ship Liddesdale.*(6) The Courts below held that there had been here a delivery of a substantial part of the cargo by transhipment; but, first, a lump sum in a contract of this kind is regarded by the authorities as in the nature of rent for the use and hire of a specified ship for a specified voyage—*The Norway*(7); *Robinson* v. *Knights*(8); *Merchant Shipping Co.* v. *Armitage*(9); *Mitchell* v. *Darthez*(10)—and, if that is the true view of the contract, it excludes the idea of transhipment; and, secondly, transit by the action of the wind and tide is not transhipment within the principle laid down by Lord Ellenborough in *Hunter* v. *Prinsep.*(11) There is no case in the books in which a lump sum freight has been held to be payable where the ship has not arrived.

Adair Roche, K.C., and *Robertson Dunlop*, for the respondents, were not called upon.

VISCOUNT HALDANE L.C. My Lords, if I entertained any doubt about this case I should ask your Lordships to take time to consider it, but it seems to me, both upon the facts and upon the law, a plain case. It arises between the owners of the cargo, who are the appellants, and the owners, who are the respondents, of the ship which was chartered by the appellants. The charterparty was made on September 1, 1911, and

(1) [1901] A. C. 462, at p. 473.
(2) (1797) 7 T. R. 381.
(3) (1808) 10 East, 295, at p. 308.
(4) (1795) 6 T. R. 320; 2 Sm. L. C. (11th ed.) 1.
(5) (1867) L. R. 2 C. P. 651.
(6) [1900] A. C. 190, at p. 202.
(7) (1865) 3 Moo. P. C. (N.S.) 245, at p. 265.
(8) (1873) L. R. 8 C. P. 465, at pp. 467, 468.
(9) (1873) L. R. 9 Q. B. 99.
(10) (1836) 2 Bing. N. C. 555.
(11) (1808) 10 East, 378, at p. 394.

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its purport was this. The steamer was to carry a full and safe deck load at charterers' risk, not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture, and being so loaded was to proceed to Port Talbot dock as ordered, or so near thereunto as she could safely get, and deliver the same, always afloat, on being paid freight as follows. Then it was provided that a lump sum of 1600*l.* was to be the freight "in full of all port charges and pilotages, in consideration of which owners place at charterers' disposal the full reach of steamer, on and under decks, including spare bunkers, if any." Then there is the usual clause excepting perils of the sea, and then there is, finally, the only other clause I need read, clause 9: "The freight to be paid in cash without discount (less freight advance, if any) on unloading and right delivery of the cargo." That is a not unimportant clause.

Now, my Lords, what happened was this. The steamer sailed from the port of loading and she proceeded to Port Talbot, where she arrived on October 29, but she could not get into dock on that day, and before she could get into dock her anchors dragged, and her cables parted owing to perils of the sea, and in consequence she drove ashore on the north side of the breakwater at Port Talbot and there she remained. Then for the rest of what happened I turn to the judgment of Pickford J., because he has found the facts, and the learned judges in the Court of Appeal in substance concurred in his finding. He says that what happened was this (Appendix, p. 13): "Her cargo consisted partly of deck cargo, and that deck cargo was swept off; some of it was stranded on the beach and some of it was not recovered at all. The rest of the cargo was washed out and was washed out because it was assisted in being washed out by holes being cut or blasted in the side of the ship in order to enable the cargo to get out." It is not very clear what were the circumstances under which these holes were cut or blasted, but that does not matter. There was a Mr. Jenkins who appears to have acted at first on the instigation of the Salvage Association, and afterwards by arrangement with the captain, and the learned judge finds the facts as to what happened. "I think the result of that was this, that the master agreed, on behalf of his owners, to be the other contracting

party with regard to this offer which was made by Mr. Jenkins, and I do not think any difference is made by the fact that some of the work had been done before the master signed that document, and done, perhaps, by Mr. Jenkins under the impression that he was doing it under agreement with the Salvage Association. I think the result of it really was this, if you put it into legal language, that the master promised that in consideration of his going on to perform the services mentioned in his offer, he, on behalf of his owners, would pay for the whole of the contract, what had been done and what remained to be done." The effect of that was that with the assistance of Mr. Jenkins it became possible for the shipowner to see that the cargo got into the hands of the cargo owners, who obtained delivery of some two-thirds or three-fourths of it as the result of what I have described.

Now, my Lords, the question which is argued, the main question, is this. It is said that this was what is called a lump sum contract, and that, as the ship did not arrive alongside the quay in Port Talbot and deliver in the ordinary way, the freight is not payable. It is an action for freight. The shipowners were plaintiffs; they are now respondents, but they were plaintiffs in the Court of first instance, and they sued for their freight. The answer made was, "No, you have not performed your contract, which was an entire contract as shown by the nature of the consideration. You were to proceed to Port Talbot with your ship; your ship never got there; you have not performed your contract, and you are not entitled to the consideration stipulated for." But, my Lords, I do not think that the question whether the freight is a lump sum freight is in the least decisive of the character of the contract. There may be contracts, as the learned judge has said, and as Kennedy L.J. afterwards said, in which the stipulation is simply for the use of a ship, for the hiring of a ship, which is to proceed to a certain port for a lump sum; and in that case it may be, if you get such a contract, that there is no right to freight unless the voyage is completed literally. We have not to do with a contract like that; we have to deal with this contract, and as regards this contract I entirely agree with what the learned judge said, that the meaning of the

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contract in this case is that it is the ordinary and regular charter for the services of a ship to carry a particular cargo to a particular port. The substance of the contract is the carrying of the cargo, and the ship (reading the contract as a whole) is the instrument by means of which the cargo is to be carried, and considerations relating to the ship are subordinate to considerations relating to the cargo.

My Lords, in that state of facts the law which seems to me to apply is the law which was laid down by Lord Ellenborough in *Hunter* v. *Prinsep* (1) to this effect: "The ship owners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavoidable casualties: and the freighter undertakes that if the goods be delivered at the place of their destination he will pay the stipulated freight; but it was only in that event, viz. of their delivery at the place of destination, that he, the freighter, engages to pay anything. If the ship be disabled from completing her voyage, the ship owner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination."

Now the learned judge has held here that what took place was equivalent to that transhipment of which Lord Ellenborough speaks. It does not matter that it was not done in lighters; it was done by getting the pit props brought out to the beach where they were delivered. It does not matter that wind and waves played a large part in the process; the point is that they arrived there and everybody was anxious that they should arrive and was doing his best to secure that they should arrive. Under those circumstances the learned judge has held that the facts are facts which amount to a transhipment of the goods, or at any rate have the same effect in law, and that, consequently, there was delivery of two-thirds of the cargo, and as to the rest of the cargo it came within the clause excepting perils of the sea.

My Lords, I entirely concur in the judgment of Pickford J. and the reasoning of the learned Lords Justices in the Court of Appeal who took the same view. I therefore move your Lordships that the appeal be dismissed with costs.

(1) 10 East, 378.

LORD SHAW OF DUNFERMLINE. My Lords, by contract of affreightment certain owners, for a lump sum of freight, contracted that they would convey a full cargo of props from Uleaborg in the Gulf of Finland to Port Talbot. The charter-party is in no unfamiliar terms, and it contains the ordinary exception of perils of the sea.

The ship performed the voyage up to almost the harbour mouth at Port Talbot; she anchored just outside, when her cable, owing to stress of weather, parted, and she then foundered. She never, as a ship, did arrive in the port of delivery.

My Lords, I am of opinion that the dominant idea of this contract is delivery of the pit prop cargo. I agree with the manner in which that idea is expressed by Farwell J. when he says: "The gist of the contract is that the shipowner should convey and deliver to the charterer or his consignee the goods included in the charter." It is also, no doubt, true, and in no way inconsistent with this, that the shipper could not have employed the ship for any other purpose than as the instrument for this delivery.

The further facts, however, proved are that the shipowner under the circumstances to which I have referred collected all the available cargo, and—for I hold that the action of the underwriters and those in their position subsequent to the disaster was action with his authority—blew in the side of the vessel to facilitate the discharge, and delivery was made of all the props in Port Talbot except those which had been lost by perils of the sea. In my opinion the freight contracted for has, in those circumstances, been earned—there has been right and true delivery, taking into account that exception of perils of the sea which the contract itself contains.

This appears to me to be in complete accord with the principle laid down by Lord Lindley in the case of *Williams*. (1) The dominant idea of the contract being, as I have pointed out, carriage of goods and delivery thereof, I venture to quote as my own the language used by Pickford J. where he says (Appendix to this case, p. 16: "I think that if the whole of the cargo had been collected

(1) [1901] A. C. 462.

H. L. (E.) 1914

WILLIAM THOMAS & SONS v. HARROWING STEAMSHIP COMPANY.

Lord Shaw of Dunfermline.

and delivered it is exactly as if the whole of the cargo has been transhipped and delivered in another ship."

My Lords, that being the principle with regard to the whole cargo, I think the same principle applies if there is, as here, delivery of a substantial part of the cargo, the balance being undelivered owing to the excepted peril. Under those circumstances I think that the principle of quantum meruit is not applicable. The contract itself in my opinion, my Lords, covers the situation which has arisen. I do not doubt that the Courts below have reached a conclusion which is in accord not only with shipping law but with sound mercantile practice and with reason.

LORD MOULTON. My Lords, I concur.

LORD PARMOOR. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 26, 1914.

Solicitors for appellants: *Trinder, Capron & Co.*
Solicitors for respondents: *Holman, Birdwood & Co.*

[HOUSE OF LORDS.]

HERD . . . . . APPELLANT;

AND

WEARDALE STEEL, COAL AND COKE COMPANY, LIMITED AND OTHERS . . . RESPONDENTS.

H. L. (E.)*
1914
June 30.

False Imprisonment—Miner in Coal Mine—Refusal to work—Refusal of Employers to afford Facilities for leaving the Mine.

A miner descended a coal mine at 9.30 A.M. for the purpose of working therein for his employers, the owners of the colliery. In the ordinary course he would be entitled to be raised to the surface at the conclusion of his shift, which expired at 4 P.M. On arriving at the bottom of the mine the miner was ordered to do certain work which he wrongfully refused to do, and at 11 A.M. he requested to be taken to the surface in a lift, which was the only means of egress from the mine. His employers refused to permit him to use the lift until 1.30 P.M. although it had been available for the carriage of men to the surface from 1.10 P.M., and in consequence he was detained in the mine against his will for twenty minutes. In respect of this detention the miner sued his employers for damages for false imprisonment:—

Held, on the principle of volenti non fit injuria, that the action could not be maintained.

Decision of the Court of Appeal [1913] 3 K. B. 771 affirmed.

APPEAL from an order of the Court of Appeal reversing a judgment of Pickford J. (1)

The appellant was employed as a hewer at the Thornley Colliery in the county of Durham. The respondents the Weardale Steel, Coal and Coke Company were the proprietors of the colliery, the respondent Curry was the manager, and the respondent Turner was an overman employed at the colliery.

The appellant brought an action against the respondents for damages for false imprisonment. By his statement of claim he alleged that on May 30, 1911, the respondents wrongfully prevented him from using the cage, which was the only means of egress from the mine, whereby he was imprisoned in the mine till 1.30 P.M.

* *Present:* VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

(1) [1913] 3 K. B. 771.

H. L. (E.) 1914 HERD v. WEARDALE STEEL, COAL AND COKE COMPANY, LIMITED.

The respondents denied the alleged false imprisonment and justified their refusal to raise the appellant on the ground that he had been guilty of a breach of contract in refusing to do some work which he was ordered to do.

The appellant was employed under a verbal contract of service determinable on either side by fourteen days' notice, and was so employed subject to the provisions of the Coal Mines Regulation Acts, 1887 to 1908, and the special rules established at the colliery pursuant to s. 51 of the Coal Mines Regulation Act, 1887, and subject to the terms of an agreement between the Durham Coal Owners' Association and the Durham Miners' Association dated December 13, 1909, for the purpose of settling the working conditions at the collieries in the county of Durham having regard to the provisions of the Coal Mines Regulation Act, 1908. The Thornley Colliery was entered by means of a shaft and the men were lowered to and raised from the mine by means of two cages worked by machinery whereby one cage was caused to descend and the other to ascend at the same time. The mine was worked on the three-shift system and the duration of the shift for hewers at the mine was fixed at seven hours ten minutes. The times of the lowering and raising of the men were also fixed by the said Act and agreement, and a notice of the times so fixed was posted at the pit head. Under the foregoing regulations and agreement it was a term of the appellant's employment that he should not, until the conclusion of his shift, go into any other part of the mine than that in which he had been placed by the overman, deputy, or other official, and should at the conclusion of his shift be raised from the mine by means of the cage.

At about 9.30 A.M. on May 30, 1911, the appellant descended the mine with the intention of working. In the ordinary course the appellant would have been entitled to be raised from the mine at the conclusion of his shift, which came to an end about 4 P.M.

The only means of access or egress to or from the mine was by the cages in the shaft. These cages were used for the conveyance of workmen and coal, but when being used for coal workmen were not allowed to enter them. After descending the mine the appellant and two other men were directed by the deputy

overseer to do certain work, but they, believing that the work was unsafe and that the direction was in breach of an oral agreement which had been entered into between a representative of the men and the manager of the colliery, refused to do the work, and at about 11 A.M. they and twenty-nine other men acting in sympathy with them requested Turner to allow them to ascend the shaft by means of the cage as they desired to leave the mine. Turner, acting on the instructions of Curry, informed the men that permission to use the cage would not be granted until the conclusion of the shift. There were several occasions on which the cage came down during the morning, but on many of these occasions it was being used for the purpose of hoisting coal. At about 1 P.M., when the men had been at the bottom of the shaft for about two hours, a signal came from the bank at the top indicating that some boys were about to come down. The cage at the bottom of the shaft was then empty and available for the carriage of men. The men were forbidden to enter the cage, but some of them (not including the appellant) did enter, and refused to leave when ordered out. Whereupon the cage, by the manager's orders, was kept stationary in the shaft for a period of twenty minutes. Ultimately, at about 1.30 P.M., permission was given to the men to go up, and permission was given to the appellant to enter the cage, which he did, and the cage was then raised to the surface.

Proceedings were subsequently taken by the respondent company against the appellant in a Court of summary jurisdiction under the Employers and Workmen Act, 1875, to recover damages in respect of the appellant's breach of contract, and the Court awarded the respondent company 5*s*. damages and costs.

The action was tried before Pickford J., sitting without a jury, at Newcastle-upon-Tyne on November 8, 1912, and on November 30, 1912, at Leeds, the learned judge gave judgment for the appellant for 20*s*. and costs on the High Court scale.

The Court of Appeal (Buckley and Hamilton L.JJ., Vaughan Williams L.J. dissenting) reversed the judgment of Pickford J. and ordered judgment to be entered for the respondents, the defendants.

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1914. June 29, 30. *Tindal Atkinson, K.C.*, and *Adair Roche, K.C.* (with them *M. P. Griffith-Jones*), for the appellant. The false imprisonment consists in the respondents actively preventing the appellant from using the cage, which was the only means of access and egress to and from the mine, when it was available for the use of the men. The respondents for their own profit were using workmen at the bottom of a pit and the only means of egress was a cage under their control. Is it to be said that because a workman breaks his contract the employer is to be entitled to keep him as a penalty at the bottom of the pit until the expiration of the shift? The appellant was asking for no extra facilities, but he was in a position of a free man entitled to leave his work at any time subject to any right of damages the employer might have against him for breach of contract. There is a difference between asking for extra facilities and asking to take advantage of facilities already there. This is a tort. It is exactly the same thing as if the employer chose to lock the door on the workman. Suppose this cage was being used for taking up men from an intermediate shift, could the employer prevent other workmen from going up, assuming there was room for them? The men are entitled to use the ordinary means of egress when it is working for the purpose of men making an exit from the mine as and when they please. It was not an implied term of the contract of employment that the miner should remain down the mine until the conclusion of the shift. The Coal Mines Regulation Act, 1887, s. 16, requires that proper apparatus for raising and lowering persons at each shaft shall be constantly available for use. The respondents are claiming to compel specific performance of their contract by indirect means.

[VISCOUNT HALDANE L.C. referred to *Robinson* v. *Balmain New Ferry Co.* (1)]

That case shows that, so long as there is one route open by which the man can leave, there is no false imprisonment, and it is distinguishable from the present case on that ground.

Sir Robert Finlay, K.C., *E. A. Mitchell-Innes, K.C.*, and *C. F. Lowenthal*, for the respondents, were not called on.

(1) [1910] A. C. 295.

VISCOUNT HALDANE L.C. My Lords, by the law of this country no man can be restrained of his liberty without authority in law. That is a proposition the maintenance of which is of great importance; but at the same time it is a proposition which must be read in relation to other propositions which are equally important. If a man chooses to go into a dangerous place at the bottom of a quarry or the bottom of a mine, from which by the nature of physical circumstances he cannot escape, it does not follow from the proposition I have enunciated about liberty that he can compel the owner to bring him up out of it. The owner may or may not be under a duty arising from circumstances, on broad grounds the neglect of which may possibly involve him in a criminal charge or a civil liability. It is unnecessary to discuss the conditions and circumstances which might bring about such a result, because they have, in the view I take, nothing to do with false imprisonment.

My Lords, there is another proposition which has to be borne in mind, and that is the application of the maxim volenti non fit injuria. If a man gets into an express train and the doors are locked pending its arrival at its destination, he is not entitled, merely because the train has been stopped by signal, to call for the doors to be opened to let him out. He has entered the train on the terms that he is to be conveyed to a certain station without the opportunity of getting out before that, and he must abide by the terms on which he has entered the train. So when a man goes down a mine, from which access to the surface does not exist in the absence of special facilities given on the part of the owner of the mine, he is only entitled to the use of these facilities (subject possibly to the exceptional circumstances to which I have alluded) on the terms on which he has entered. I think it results from what was laid down by the Judicial Committee of the Privy Council in *Robinson* v. *Balmain New Ferry Co.* (1) that that is so. There there was a pier, and by the regulations a penny was to be paid by those who entered and a penny on getting out. The manager of the exit gate refused to allow a man who had gone in, having paid his penny, but having changed his mind about embarking on

(1) [1910] A. C. 295.

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a steamer, and wishing to return, to come out without paying his penny. It was held that that was not false imprisonment; volenti non fit injuria. The man had gone in upon the pier knowing that those were the terms and conditions as to exit, and it was not false imprisonment to hold him to conditions which he had accepted. So, my Lords, it is not false imprisonment to hold a man to the conditions he has accepted when he goes down a mine.

My Lords, I do not wish to be understood as saying that no other question than that of contract comes into this case, for the Coal Mines Regulation Act, 1887, lays down a statutory obligation on the owner of mines to provide access to the surface, and it lays down conditions as regards the availability of that access. But the material point is this: that on considering the provisions of that statute I find nothing which entitles a miner to claim to use the winding-up cage at any moment he pleases. It may be that the cage is full of coal; it may be that it is employed in drawing other people up; it may be that it is very inconvenient for other reasons to use it at the moment. It is enough that no right is given by statute which enables the workman to claim to use the cage at any moment he pleases.

Now, my Lords, in the present case what happened was this. The usage of the mine—a usage which I think must be taken to have been notified—was that the workman was to be brought up at the end of his shift. In this case the workman refused to work; it may have been for good reasons or it may have been for bad,—I do not think that question concerns us. He said that the work he had been ordered to do was of a kind that was dangerous, and he threw down his tools and claimed to come up to the surface. The manager, or at any rate the person responsible for the control of the cage, said: "No, you have chosen to come at a time which is not your proper time, and although there is the cage standing empty we will not bring you up in it," and the workman was in consequence under the necessity of remaining at the bottom of the shaft for about twenty minutes. There was no refusal to bring him up at the ordinary time which was in his bargain; but there was a refusal,—and I am quite ready to assume that the motive of it was to punish him, I will assume it

for the sake of argument, for having refused to go on with his work—by refusing to bring him up at the moment when he claimed to come. Did that amount to false imprisonment? In my opinion it did not. No statutory right under the Coal Mines Regulation Act, 1887, avails him, for the reason which I have already spoken of. Nor had he any right in contract. His right in contract was to come up at the end of his shift. Was he then falsely imprisoned? There were facilities, but they were facilities which, in accordance with the conditions that he had accepted by going down, were not available to him until the end of his shift, at any rate as of right.

My Lords, under these circumstances I find it wholly impossible to come to the conclusion that the principle to which I have alluded, and on which the doctrine of false imprisonment is based, has any application to the case. Volenti non fit injuria. The man chose to go to the bottom of the mine under these conditions,—conditions which he accepted. He had no right to call upon the employers to make use of special machinery put there at their cost, and involving cost in its working, to bring him to the surface just when he pleased.

My Lords, I am aware that this question is one which will probably give rise to great general interest; but, whatever may be the feeling about questions of this kind, it is still more important that in deciding matters arising out of them strict adherence is maintained to intelligible and well-defined principles of our law so long as they stand part of it. The law of England seems to me, as it stands to-day, to be perfectly defined as regards cases of the kind, and, if it is to be altered, it must be altered by statute. It may obviously be very difficult to make any provision in relation to coal mines which requires that a workman should be entitled to come up at any moment he pleases. The nature of the employment will probably always require reasonable restrictions. But what we are concerned with at the moment is this and this simply: that no conditions existed which enabled the miner in this case to claim the right which he asserted, and that there was nothing which comes within the definition well known in the law of England which amounts to false imprisonment.

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Under these circumstances, my Lords, I am unable to come to any other conclusion than that Pickford J. was wrong and that the majority of the Court of Appeal were right, and that this appeal ought to be dismissed with costs. I move your Lordships accordingly.

LORD SHAW OF DUNFERMLINE. My Lords, this is an action founded on tort, and the tort alleged is false imprisonment. I put to the learned counsel for the appellant what was the basis of the tort upon which he relied? And it was—as it must have been—admitted by him that that basis lay in the contractual relations subsisting between the employers and the appellant. Voluntarily the employee went down the shaft of this mine. The basis of his rights being estimated as per his contract, it becomes important to see exactly the true extent and nature of his contract. They were that he should be taken down to his work when his work began, namely at the beginning of the shift, and when his work was ended, namely at the end of the shift, he should be brought up to the surface. There was so far as I know no express arrangement or bargain of any other kind. My Lords, while that was the express bargain, it may also be implied from such a contract that if, say, illness occurred on the part of the workman during the currency of the shift there would also then emerge a right to be removed to the surface. That is a special implication arising from exceptional circumstances.

My Lords, I now ask myself, these being the contract relations of the parties, was it any part of the contract between them that the master became obliged to give the workman the use —on demand—of the machinery for ascending from and descending the shaft? It is an admission in the case that the contract was broken; it is also an admission that there was no emerging implication of contract such as illness; and it is the last admission in the case that, the contract being broken, all the claim of alleged false imprisonment depends upon this,—that the workman's demand to be instantly let up to the surface by the master's machinery was not instantly obeyed.

My Lords, I find no ratio which would enable me to posit

a legal foundation for such a claim. For, my Lords, observe what it would result in. Such a view would be to compel one party, founding on a contract and abiding by it, to do something to assist the other party in the abandonment and violation of that very contract which is founded upon. That, my Lords, is a contradiction in legal thought, and it is indefensible in actual practice.

I admit, my Lords, that what has been referred to by the noble Viscount on the woolsack must be carefully attended to in these cases, namely, the provisions of the Coal Mines Regulation Act with regard to the ascending and descending as well as to the other conduct of the mine. But, my Lords, there is no rule under the Coal Mines Regulation Act in general, and no special rule applicable to this mine, which covers the situation which has arisen. After some experience, my Lords, extending over many years in the analysis of both general and special rules under the Mines Acts, I myself should incline to doubt whether it might not be accompanied by great confusion, and in certain circumstances by danger, if a rule were to be set up in a mine that the winding machinery was to be set in operation upon the demand of every workman, and at his will. A different principle is now applied, namely that the proper authority is to consider the whole situation of the mine and to issue orders accordingly. And, my Lords, in the absence of any rule we are accordingly driven back to the contract with which I have already dealt.

Is there any other ground, my Lords, upon which this action could be maintained? Can it be maintained as an action of tort on general grounds, such as some violation of natural liberty? The answer to that, my Lords, your Lordship on the woolsack has already expressed. This man voluntarily went down the mine. There is no right of natural liberty at all that he should come up at his own time and on his own demand. He went down under the arrangement, which was perfectly well known to him, that he was expected to come up, and had alone a right to come up, when the shift was completed. There is no question of general tort or of general invasion of freedom.

In concluding, my Lords, I desire to say that I pass no

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judgment either by way of commendation or of reflection upon the action adopted in this mine with regard to this particular workman. These are questions of policy with which we have in this House, in our present situation, nothing to do; but I will say that I think it much to be regretted that, under the head of false imprisonment, a confusion should have been threatened in any part of the administration of our law—false imprisonment as a head of tort being perfectly well understood and clearly failing to apply to any case in which a contract existing between the parties has in no respect been violated.

LORD MOULTON. My Lords, I concur, and I should add nothing to the two opinions which have been delivered, with both of which I entirely agree, if it were not that this case touches one of the fundamental concepts of the English common law, namely, false imprisonment; a concept which, although I do not think that there is any doubt as to its delimitations, is one of those which are most likely to lead to mistaken ideas in the minds of laymen and those who have not thoroughly mastered the elements of law.

In the first place let me clear away one class of considerations with which we here have nothing to do. We have nothing to do with considerations that relate to the safety of human life, or the exceptional incidents in life, such as sudden illness or urgent calls based on our duties to other people which may interfere with contracts of labour. It is scarcely possible to ascertain from recorded cases the exact legal effect of such considerations, and for this reason. In honour of human nature it must be said that when cases like these occur it is in the highest degree rare to find people standing on their strict contractual rights; there is generally an eagerness to meet the claims of the unfortunate. Therefore it has never been settled, and I trust it will never have to be settled, how far the deviations from the ordinary rules of behaviour which then occur are strictly contractual rights, and how far they are dependent merely on the general loving kindness of mankind. But we have nothing to do with such questions here. Two parties are here insisting on their strict legal rights. The plaintiff is insisting that making

some workmen wait for a time before they are drawn up in the cage is to be called false imprisonment; and the masters are insisting that they were not obliged to draw those workmen up in the cage until the contractual time for so doing had arrived—a point of time as to which there is no dispute. We are therefore considering a question of pure law. To my mind there are no sentimental considerations which could have any tendency to lead us to decide on the one side or the other; what we have to do is to protect the concept of false imprisonment from being disfigured by a wrong decision.

Looked at from that point of view, what are the facts of this case? The defendants are mine owners; they have excavated shafts, and they have fitted them up with mining machinery under the strict regulations of the Coal Mines Regulation Act, and no one says that they have not fulfilled their statutory duties in that respect. That Act requires that the winding machinery shall always be in a condition to do its work, so that, if it is properly called upon to do it, it may be able to perform it. This required a large outlay of capital initially; it requires now a large daily outlay to work it.

What is the position of the plaintiff? The plaintiff is a workman who has undertaken to work in the mine on certain purely contractual terms. There is no doubt as to the stipulations of his contract. His contract is that he is to be taken down the shaft on presenting himself at the pit mouth within certain hours, that he is to work for the seven hours and ten minutes, which is the length of his shift, and that he is to be drawn up once more on presenting himself at the pit bottom between fixed times. The plaintiff, as is admitted, broke his contract, refused to work, came to the pit bottom at a time other than that which was stipulated in the contract, and demanded to be taken up.

I will assume that it was possible for the masters to take him up to the surface at the moment when he presented himself at the pit bottom without interfering with the regular working of the pit; but I ask myself, under what obligation were they to do it? It is admitted that they had no such contractual obligation. But it is said that it was a tort not to do it. In other words that by the law of England they were bound to work this apparatus

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Lord Moulton.

which they had fixed for their purposes, and with their money, and which was under their control, at the bidding of a man not entitled by any contractual relation with them to demand it, and, if they did not do so, they were guilty of an actionable wrong.

My difficulty, my Lords, throughout this case has been to understand upon what ground in law the claim of the plaintiff was based. I am extremely anxious not to use any language which might hurt the feelings of the unsuccessful party in this case; for I can easily understand that, from a wrong conception of what is meant by false imprisonment, he may have worked himself into a feeling that he has suffered some serious wrong. But as far as I am concerned it appears to me that there is no support whatever to be found for such a contention in the whole law of England. That a man should be bound to work machinery which is expensive to work, and which is his, and which he is under no contract to work at the bidding of a person who, not being entitled thereto by contract, wants to come up to the surface of the ground, and that, if he does not do so, he is guilty of false imprisonment, seem to me to be propositions which need only to be stated to be rejected as being wholly contrary to that good sense on which English common law is based. I am of opinion therefore that this appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 30, 1914.

Solicitors for appellant: *Hyman Isaacs & Lewis, for Isaacs & Heath, Sunderland.*

Solicitors for respondents: *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-on-Tyne.*

[HOUSE OF LORDS.]

DUNLOP PNEUMATIC TYRE COMPANY, LIMITED. . . . . } APPELLANTS;

AND

NEW GARAGE AND MOTOR COMPANY, LIMITED . . . . . } RESPONDENTS.

H. L. (E.)*
1914
July 1.

Contract—Construction—Measure of Damages—Penalty or Liquidated Damages—Agreement for Payment of a single Sum as Liquidated Damages on Breach of several Stipulations of varying Importance.

Where a single sum is agreed to be paid as liquidated damages on the breach of a number of stipulations of varying importance, and the damage is the same in kind for every possible breach and is incapable of being precisely ascertained, the stipulated sum, provided it be a fair pre-estimate of the probable damage and not unconscionable, will be regarded as liquidated damages and not as a penalty.

Dictum of Tindal C.J. in *Kemble* v. *Farren* (1829) 6 Bing. 141, at p. 148, approved.

Dictum of Lord Watson in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1886) 11 App. Cas. 332, at p. 342, explained.

Willson v. *Love* [1896] 1 Q. B. 626 distinguished.

The appellants, who were manufacturers of motor tyres, covers, and tubes, supplied these goods to the respondents, who were dealers, under an agreement whereby the respondents, in consideration of certain trade discounts, bound themselves not to tamper with the marks on the goods, not to sell or offer the goods to any private customers or to any co-operative society at less than the appellants' current list prices, not to supply to persons whose supplies the appellants had decided to suspend, not to exhibit or export without the consent of the appellants, and to pay the sum of 5*l.* by way of liquidated damages for every tyre, cover, or tube sold or offered in breach of the agreement.

The respondents sold a tyre cover to a co-operative society below the current list price. In an action for breach of contract, it was proved that substantially the whole of the appellants' business in these articles was done through the trade; that in order to prevent underselling the appellants insisted upon all their trade customers signing agreements of this nature; and that the probable effect of underselling by any particular trade customer was to force their other trade customers to deal elsewhere:—

Held, assuming, without deciding, that the stipulated sum applied to all

* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, and LORD PARMOOR.

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the preceding stipulations in the agreement, that it was liquidated damages.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal setting aside the certificate of a Master upon an inquiry as to damages directed by Phillimore J. and the judgment signed thereon.

The appellants were manufacturers of motor tyres, covers, and tubes, and substantially the whole of their business in these articles was done through the trade. The system adopted by the appellants in regard to this business was as follows. They allowed trade purchasers certain discounts off the list prices of the goods, and in order to prevent underselling insisted upon such purchasers entering into contracts with them, whereby the purchasers agreed not to sell to private customers at less than list prices or to trade customers at less than list prices after deducting certain discounts, and further agreed, as agents of the appellants, to obtain from sub-purchasers, being trade customers, similar undertakings to observe the appellants' list prices.

In October, 1910, A. Pellant, Limited, entered into a contract with the appellants to the above effect, and thereafter the appellants supplied to them considerable quantities of Dunlop tyres, covers, and tubes. In April, 1911, the respondents, who were dealers in motor accessories, applied to A. Pellant, Limited, for tyres, covers, and tubes of the appellants' manufacture. Before supplying the goods A. Pellant, Limited, in pursuance of their contract with the appellants, required the respondents to sign the following agreement. The agreement was dated April 7, 1911. It was headed "Price Maintenance Agreement to be entered into by trade purchasers of Dunlop Motor Tyres" and was in the form of a letter addressed by the respondents to Messrs. A. Pellant, Limited, acting as agents for the Dunlop Pneumatic Tyre Company, Limited.

The respondents, in consideration of certain trade discounts being allowed them, thereby agreed as follows:—

"(1.) We will not alter or remove or in any way tamper with any of the manufacture marks or numbers on Dunlop covers or tubes.

"(2.) We will not sell or offer any Dunlop motor tyres covers or

tubes to any private customers or to any co-operative society at prices below those mentioned in the said price list current at the time of sale, nor give to any such customer or society any cash or other discounts, or advantages reducing the same. We will not sell or offer any Dunlop motor tyres, covers or tubes to any other person, firm or company at prices less than those mentioned in the said price list.

"(3.) We will not supply any such goods to any person whose supplies the Dunlop Company may decide to suspend nor to exhibit goods of Dunlop manufacture at any exhibition in the United Kingdom without the written consent of the Dunlop Company first had and obtained.

"(4.) We will not export any tyres, covers or tubes supplied hereunder to any country outside the United Kingdom without the written consent of the Dunlop Company first had and obtained.

"(5.) We agree to pay to the Dunlop Pneumatic Tyre Co., Ltd., the sum of 5*l.* for each and every tyre, cover or tube sold or offered in breach of this agreement, as and by way of liquidated damages and not as a penalty, but without prejudice to any other rights or remedies you or the Dunlop Pneumatic Tyre Co., Ltd., may have hereunder."

On May 4, 1911, the respondents committed a breach of this agreement by selling to the Motorists' Mutual Co-operative Society a tyre cover at a price less than the current list price, namely, at 3*l.* 12*s.* 11*d.* instead of 4*l.* 1*s.* Thereupon the appellants commenced an action against the respondents in the King's Bench Division for an injunction and damages. The respondents by their defence pleaded (inter alia) that the sum of 5*l.* mentioned in clause 5 of the agreement was a penalty.

The action was tried by Phillimore J., sitting without a jury. The learned judge granted an injunction and directed an inquiry as to damages to be held before a Master. The evidence of the appellants' manager, Mr. Baisley, upon the inquiry before the Master, as to the considerations which induced the appellants to fix the sum of 5*l.* as a fair and reasonable sum to be paid as damages for the breaches specified in clause 5 of the agreement is fully stated in the judgment of Lord Atkinson.

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The short effect of his evidence was that undercutting by a particular firm soon became generally known with the result that the appellants' local agents lost their business and were obliged for their own protection to resort to other firms, and in this way the appellants' selling organization became completely upset; the damage likely to accrue to the appellants from any particular breach of the agreement was difficult or impossible to prove. The Master assessed the damages at 250*l.* and directed the costs of the reference to be paid by the respondents. He found that it was left open to him to decide whether the 5*l.* fixed in the agreement was penalty or liquidated damages and he found that it was liquidated damages.

The Court of Appeal (Vaughan Williams and Swinfen Eady L.JJ., Kennedy L.J. dissenting) reversed the finding of the Master and held that the 5*l.* was a penalty and that the plaintiffs were entitled to nominal damages only. They accordingly ordered that judgment be entered for the plaintiffs for the sum of 2*l.* and ordered the plaintiffs to pay the costs of the reference.

1914. May 18, 19. *Younger*, *K.C.*, and *Disturnal*, *K.C.* (with them *Kingsbury*), for the appellants. The damage in this case does not depend upon the value of the article sold in breach of the agreement, but upon the discontent occasioned by the underselling among the appellants' other agents. There is nothing unreasonable in the parties fixing by agreement a sum to be paid as liquidated damages for future breaches, where the amount of damage likely to accrue cannot be accurately ascertained or foreseen or is difficult of proof: *Kemble* v. *Farren* (1), per Tindal C.J.; *Wallis* v. *Smith* (2); *Atkyns* v. *Kinnier* (3); *Reynolds* v. *Bridge* (4); *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (5); *Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda* (6); *Webster* v. *Bosanquet.* (7) The test is whether the stipulated sum is a genuine pre-estimate of the probable damage: *Public Works*

(1) 6 Bing. 141, at p. 148.
(2) (1882) 21 Ch. D. 243.
(3) (1850) 4 Ex. 776.
(4) (1856) 6 E. & B. 528.
(5) 11 App. Cas. 332.
(6) [1905] A. C. 6.
(7) [1912] A. C. 394.

Commissioner v. *Hills*. (1) *Willson* v. *Love* (2), where a lessee covenanted not to sell hay or straw off the premises during the last twelve months of the term, but to consume the same upon the premises, and to pay an additional rent of 3*l*. per ton for every ton of hay or straw so sold, is distinguishable, first, because the word used was "penalty" and not "liquidated damages," and, secondly, because there was a substantial difference between the manurial values of hay and straw and those values were easily ascertainable: see *Diestal* v. *Stevenson*. (3) The word used, though not conclusive, affords some presumption as to the meaning of the parties: *Pye* v. *British Automobile Commercial Syndicate*. (4) Upon the construction of clause 5 of this contract the 5*l*. relates only to a breach of clause 2, but, assuming that it relates to all the foregoing clauses, the result is the same. Take the case of a single stipulation; varying breaches might cause varying damage, but it is not suggested that in that case the sum agreed upon might not be liquidated damages, provided the sum is not unconscionable. Then does it make any difference that the contract contains several stipulations? It will be said that there is a rule that in such a case the stipulated sum must be a penalty, but if any such rule exists it is a highly artificial rule and has no foundation in reason. Upon any construction of the contract the damage arising from any particular breach is incapable of being estimated, and it cannot be said in any particular case that it must necessarily be less than the sum fixed. There is no indication here that this sum is to be regarded as a penalty and not as liquidated damages, and, the onus being on the respondents to prove that this was a penalty, they have failed to discharge it.

McCall, K.C., and *Morton Smith*, for the respondents. The question is whether this case falls within the line of authorities from *Kemble* v. *Farren* (5) down to the present time which are described by Lord Coleridge in *Magee* v. *Lavell* (6) as

(1) [1906] A. C. 368.
(2) [1896] 1 Q. B. 626.
(3) [1906] 2 K. B. 345, at p. 351.
(4) [1906] 1 K. B. 425.
(5) 6 Bing. 141.
(6) (1874) L. R. 9 C. P. 107, at pp. 111 and 115.

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establishing the principle "that where the contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty." That rule has been acted upon in this House and in the Privy Council, and a rule so well established ought not to be lightly interfered with. The effect of *Kemble* v. *Farren* (1) is stated in the same way by Lord Westbury in *Thompson* v. *Hudson* (2), by Martin and Bramwell BB. in *Betts* v. *Burch* (3) (approved by Willes J. in *Hinton* v. *Sparkes* (4)), and by James L.J. and Baggallay J.A. in *In re Newman* (5), where Bramwell J.A. quotes with approval the rule laid down by Lord Coleridge in *Magee* v. *Lavell*. (6) Jessel M.R. in *Wallis* v. *Smith* (7) was wrong in treating Lord Coleridge's statement of the rule as dictum only; it was the foundation of the judgment of the full Court of Common Pleas. Lord Watson again states the rule in clear terms in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (8) and practically follows *Magee* v. *Lavell* (6) and *In re Newman*. (9) Upon the construction of this agreement the sum of 5*l.* applies to all the foregoing clauses and on that hypothesis it covers matters of very different importance; and if the amount of damage in any of the cases covered by this stipulation is so small that the agreed sum would be an inordinate amount to pay for it, that goes far to show that this sum ought to be regarded as a penalty. The Courts have drawn a marked distinction between a single stipulation which may be violated in different ways and a series ofs tipulations of widely different value: *Strickland* v. *Williams* (10); *Ford Motor Company* (*England*) v. *Armstrong*. (11) The dissatisfaction of the appellants' agents and the possibility of their dealing elsewhere are not the direct and natural consequences of the breach of this agreement and, it is submitted,

(1) 6 Bing. 141.
(2) (1869) L. R. 4 H. L. 1, at p. 50.
(3) (1859) 4 H. & N. 506.
(4) (1868) L. R. 3 C. P. 161, at p. 166.
(5) (1876) 4 Ch. D. 724, at pp. 731, 733.
(6) L. R. 9 C. P. 107.
(7) 21 Ch. D. 243.
(8) 11 App. Cas. 332, at p. 342.
(9) 4 Ch. D. 724.
(10) [1899] 1 Q. B. 382, at p. 384.
(11) (1914) 30 Times L. R. 400.

are not admissible in evidence on the question of damages. Moreover, the pre-estimate must be one that is made by both parties, and it must be shown that the respondents had some knowledge of the prejudicial result which a breach of the contract would have upon the relation of the appellants and their agents.

Disturnal, K.C., in reply. It is open to the parties in every case to make a genuine pre-estimate of damages, and where the Court sees that this has been done it will regard the stipulated sum as liquidated damages provided it does not exceed the probable maximum damage which would occur in any particular case. In *Magee* v. *Lavell* (1) the sum was on the face of the contract a penalty.

The House took time for consideration.

July 1. LORD DUNEDIN. My Lords, the appellants, through an agent, entered into a contract with the respondents under which they supplied them with their goods, which consisted mainly of motor-tyre covers and tubes. By this contract, in respect of certain concessions as to discounts, the respondents bound themselves not to do several things, which may be shortly set forth as follows: not to tamper with the manufacturers' marks; not to sell to any private customer or co-operative society at prices less than the current price list issued by the Dunlop Company; not to supply to persons whose supplies the Dunlop Company had decided to suspend; not to exhibit or to export without the Dunlop Company's assent. Finally, the agreement concluded (clause 5), "We agree to pay to the Dunlop Pneumatic Tyre Company, Ltd. the sum of 5*l.* for each and every tyre, cover or tube sold or offered in breach of this agreement, as and by way of liquidated damages and not as a penalty."

The appellants, having discovered that the respondents had sold covers and tubes at under the current list price, raised action and demanded damages. The case was tried and the breach in fact held proved. An inquiry was directed before the Master as to damages. The Master inquired, and assessed the damages at

(1) L. R. 9 C. P. 107.

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250*l.*, adding this explanation: "I find that it was left open to me to decide whether the 5*l.* fixed in the agreement was penalty or liquidated damages. I find that it was liquidated damages."

The respondents appealed to the Court of Appeal, when the majority of that Court, Vaughan Williams and Swinfen Eady L.JJ., held, Kennedy L.J. dissenting, that the said sum of 5*l.* was a penalty, and entered judgment for the plaintiffs for the sum of 2*l.* as nominal damages. Appeal from that decision is now before your Lordships' House.

My Lords, we had the benefit of a full and satisfactory argument, and a citation of the very numerous cases which have been decided on this branch of the law. The matter has been handled, and at no distant date, in the Courts of highest resort. I particularly refer to the *Clydebank Case* (1) in your Lordships' House and the cases of *Public Works Commissioner* v. *Hills* (2) and *Webster* v. *Bosanquet* (3) in the Privy Council. In both of these cases many of the previous cases were considered. In view of that fact, and of the number of the authorities available, I do not think it advisable to attempt any detailed review of the various cases, but I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative:—

1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.

2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (*Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda* (1)).

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided

(1) [1905] A. C. 6. (2) [1906] A. C. 368.
(3) [1912] A. C. 394.

upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (*Public Works Commissioner* v. *Hills* (1) and *Webster* v. *Bosanquet* (2)).

4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are :

(*a*) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in *Clydebank Case*. (3))

(*b*) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (*Kemble* v. *Farren* (4)). This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A. promised to pay B. a sum of money on a certain day and did not do so, B. could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable,—a subject which much exercised Jessel M.R. in *Wallis* v. *Smith* (5)—is probably more interesting than material.

(*c*) There is a presumption (but no more) that it is penalty when " a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage " (Lord Watson in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (6)).

On the other hand :

(*d*) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such

(1) [1906] A. C. 368.
(2) [1912] A. C. 394.
(3) [1905] A. C. 6.
(4) 6 Bing. 141.
(5) 21 Ch. D. 243.
(6) 11 App. Cas. 332.

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as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties (*Clydebank Case*, Lord Halsbury (1); *Webster* v. *Bosanquet*, Lord Mersey (2)).

Turning now to the facts of the case, it is evident that the damage apprehended by the appellants owing to the breaking of the agreement was an indirect and not a direct damage. So long as they got their price from the respondents for each article sold, it could not matter to them directly what the respondents did with it. Indirectly it did. Accordingly, the agreement is headed "Price Maintenance Agreement," and the way in which the appellants would be damaged if prices were cut is clearly explained in evidence by Mr. Baisley, and no successful attempt is made to controvert that evidence. But though damage as a whole from such a practice would be certain, yet damage from any one sale would be impossible to forecast. It is just, therefore, one of those cases where it seems quite reasonable for parties to contract that they should estimate that damage at a certain figure, and provided that figure is not extravagant there would seem no reason to suspect that it is not truly a bargain to assess damages, but rather a penalty to be held in terrorem.

The argument of the respondents was really based on two heads. They overpressed, in my judgment, the dictum of Lord Watson in *Lord Elphinstone's Case* (3), reading it as if he had said that the matter was conclusive, instead of saying, as he did, that it raised a presumption, and they relied strongly on the case of *Willson* v. *Love*. (4)

Now, in the first place, I have considerable doubt whether the stipulated payment here can fairly be said to deal with breaches, "some of which"—I am quoting Lord Watson's words—"may occasion serious and others but trifling damage." As a mere matter of construction, I doubt whether clause 5 applies to anything but sales below price. But I will assume that it does. None the less the mischief, as I have already pointed out, is an indirect mischief, and I see no data on which, as a matter

(1) [1905] A. C. at p. 11.
(2) [1912] A. C. at p. 398.
(3) 11 App. Cas. 332, at p. 342.
(4) [1896] 1 Q. B. 626.

of construction, I could settle in my own mind that the indirect damage from selling a cover would differ in magnitude from the indirect damage from selling a tube; or that the indirect damage from a cutting-price sale would differ from the indirect damage from supply at a full price to a hostile, because prohibited, agent. You cannot weigh such things in a chemical balance. The character of the agricultural land which was ruined by slag heaps in *Elphinstone's Case* (1) was not all the same, but no objection was raised by Lord Watson to applying an overhead rate per acre, the sum not being in itself unconscionable.

I think *Elphinstone's Case* (1), or rather the dicta in it, do go this length, that if there are various breaches to which one indiscriminate sum to be paid in breach is applied, then the strength of the chain must be taken at its weakest link. If you can clearly see that the loss on one particular breach could never amount to the stipulated sum, then you may come to the conclusion that the sum is penalty. But further than this it does not go; so, for the reasons already stated, I do not think the present case forms an instance of what I have just expressed.

As regards *Willson's Case* (2), I do not think it material to consider whether it was well decided on the facts. For it was decided on the view of the facts that the manurial value of straw and of hay were known ascertainable quantities as at the time of the bargain, and radically different, so that the damage resulting from the want of one could never be the same as the damage resulting from the want of the other.

Added to that, the parties there had said "penalty," and the effort was to make out that that really meant liquidated damages; and lastly, if my view of the facts in the present case is correct, then Rigby L.J. would have agreed with me, for the last words of his judgment are as follows: "On the other hand it is stated that, when the damages caused by a breach of contract are incapable of being ascertained, the sum made by the contract payable on such a breach is to be regarded as liquidated damages. The question arises, What is meant in this statement by the expression 'incapable of being ascertained'? In their proper sense the words appear to refer to a case where no rule or measure

(1) 11 App. Cas. 332. (2) [1896] 1 Q. B. 626.

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of damages is available for the guidance of a jury as to the amount of the damages, and a judge would have to tell them they must fix the amount as best they can." To arrive at the indirect damage in this case, supposing no sum had been stipulated, that is just what a judge would, in my opinion, have had to do.

On the whole matter, therefore, I go with the opinion of Kennedy L.J., and I move your Lordships that the appeal be allowed, and judgment given for the sum as brought out by the Master, the appellants to have their costs in this House and in the Courts below.

LORD ATKINSON. My Lords, the action out of which this appeal arises was brought upon a contract entered into between the appellants, through the agency of Messrs. Pellant, Limited, and the respondents, claiming, amongst other things, to recover a sum of 5*l.* in respect of each of the breaches of this contract complained of. The sole question for decision on this appeal is whether this sum of 5*l.* is a penalty or liquidated damages.

The appellants are extensive and well-known manufacturers of motor tyres, covers, and tubes, a trade in which there is keen competition. They have no patents protecting their manufacture. Success over their competitors depends on the reputation acquired for their products, and largely upon the efficiency of the organization of their business. Ninety-nine per cent. of their output in this class of goods is sold through what Mr. Baisley, one of their managers who was examined as a witness, described as their distributing organization. It consists in this, that they sell to motor car manufacturers, persons called factors who resell to retail agents, and retail agents themselves, and that all these latter sell to the public, the users of the goods.

The appellants produce price lists of these goods of theirs varying from time to time. They invariably sell at these prices to the members of their distributing organization under agreements similar to that sued upon, giving, however, discount and rebates at varying rates. These agreements are styled price maintenance agreements, and their main purpose, obviously, is to prevent the sale to the public, the users, either directly or

indirectly, of the goods the appellants manufacture at prices less than those named in their price lists. The result of this is that, competition having reduced these prices to the lowest remunerative scale, the agent secures his remuneration by selling at the prices at which he buys. If he sells at lower prices than these the loss comes out of his discount and rebates, his own profits. Mr. Baisley, in his evidence (Appendix, pp. 111—116), explains elaborately the dislocation of the distributing organization of the appellants, and the injury to their trade which would ensue from the sale by one or more of their agents or factors of their goods at prices less than those named in these lists. He pointed out that if the business of one of their agents in any particular place was undercut by such sales, the agent would, owing to the diminution of his remuneration, most probably throw up his agency and become the agent of a competitor, thus leaving the field open to the rivals of the appellants; that it was essential for their trade that their wares should be obtainable all over the country at as many places as possible, and that though the consequential injury to their trade by this undercutting would, or might, be very serious, it would be very difficult to prove in evidence the precise amount of their loss in money; that considering all these things, the appellant company fixed 5*l.*, the sum mentioned in the agreement, as a fair and reasonable sum for liquidated damages in respect of the breaches specified. This evidence was uncontradicted.

In a good deal of the argument which has been addressed to your Lordships on behalf of the respondents, the true object of this price maintenance agreement, and the nature of the consequential injury to the plaintiffs' trade flowing from the breaches of it, have been somewhat lost sight of. It has been urged that as the sum of 5*l.* becomes payable on the sale of even one tube at a shilling less than the listed price, and as it was impossible that the appellant company should lose that sum on such a transaction, the sum fixed must be a penalty. In the sense of direct and immediate loss the appellants lose nothing by such a sale. It is the agent or dealer who loses by selling at a price less than that at which he buys, but the appellants have to look at their trade in globo, and to prevent the setting up, in reference to all their

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goods anywhere and everywhere, a system of injurious undercutting.

The object of the appellants in making this agreement, if the substance and reality of the thing and the real nature of the transaction be looked at, would appear to be a single one, namely, to prevent the disorganization of their trading system and the consequent injury to their trade in many directions. The means of effecting this is by keeping up their price to the public to the level of their price list, this last being secured by contracting that a sum of 5*l.* shall be paid for every one of the three classes of articles named sold or offered for sale at prices below those named on the list. The very fact that this sum is to be paid if a tyre cover or tube be merely offered for sale, though not sold, shows that it was the consequential injury to their trade due to undercutting that they had in view. They had an obvious interest to prevent this undercutting, and on the evidence it would appear to me impossible to say that that interest was incommensurate with the sum agreed to be paid.

Their object is akin in some respects to that which a trader has in binding a former employee not to set up, or carry on, a rival business within a certain area. The trader's object is to prevent competition, and especially to prevent his old customers whom the employee knows from being enticed away from him. If one takes for example the case of a plumber, the carrying on of the trade of a plumber may mean anything from mending gas pipes for a few pence apiece up to doing all the plumbing work of a big hotel. If the employee should mend one hundred of such pipes for twenty old customers at 6*d.* apiece, for which the employer would charge 1*s.* apiece, could it possibly be contended that the trader's loss was only one hundred sixpences, 2*l.* 10*s.*? It is, I think, quite misleading to concentrate one's attention upon the particular act or acts by which, in such cases as this, the rivalry in trade is set up, and the repute acquired by the former employee that he works cheaper and charges less than his old master, and to lose sight of the risk to the latter that old customers, once tempted to leave him, may never return to deal with him, or that business that might otherwise have come to him may be captured by his rival. The

consequential injuries to the trader's business arising from each breach by the employee of his covenant cannot be measured by the direct loss in a monetary point of view on the particular transaction constituting the breach. An old customer may be as effectively enticed away from him through the medium of a 10*s.* job done at a cheap rate as by a 50*l.* job done at a cheap rate, or a reputation for cheap workmanship may be acquired possibly as effectively in one case as in the other.

In many cases a person may contract to do or abstain from doing an act which is a composite act, the product or result of almost numberless other acts. For instance, if one should contract with a builder to build a house of the best materials and with the most skilled workmanship, and to hand over possession of the same completed on a certain day for 1000*l.*, 500*l.* to be paid if the agreement was not performed; every fire grate set which on completion would be found to be of bad material, every door which would be found to have been defectively hung, every cubic foot of masonry which would be found to have been badly and improperly built, would involve a breach of the agreement, but it would be quite illegitimate to thus disintegrate the obligation to do what the parties regarded as a single whole into a number of obligations to do a number of things of varying importance, and treat the 500*l.* as prima facie a penalty, because these individual breaches of the agreement did not cause, in many instances, any injury commensurate with that sum. This is the very ground, or one of the grounds, upon which Lord Herschell rests his judgment in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1) He said, "The agreement does not provide for the payment of a lump sum upon the non-performance of any one of many obligations differing in importance. It has reference to a single obligation, and the sum to be paid bears a strict proportion to the extent to which that obligation is left unfulfilled."

In the present case the agreement of the parties, in effect, though possibly not in form, did little, if anything, more than impose a single obligation, namely, to sell and endeavour to sell the goods of the appellants at the prices named in their lists,

(1) 11 App. Cas. 332, at p. 345.

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though, of course, as they sold different kinds of goods, this single obligation might be violated in many ways. Much reliance was placed by the respondents on the well-known passage in the judgment of Lord Watson in the last-mentioned case, to the effect that " when a single lump sum is made payable, by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification." It is quite true that, as mentioned by Swinfen Eady L.J., Lord Esher, in *Willson* v. *Love* (1), said that he thought this passage meant the same thing as if it ran " some of which may occasion serious and others less serious damage." With all respect, this alteration would mean that the damage resulting from each event should be almost uniform in amount, a construction which would mean that the stipulated compensation must presumably be a penalty in almost every conceivable case. Moreover, Lord Watson's statement of the law as it stands was approved by Lord Davey in *Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda* (2) and in *Webster* v. *Bosanquet* (3) without any qualification of that kind.

In this last-mentioned case, as in the present, the contract provided that the amount specified should be paid as " liquidated damages and not as a penalty." The covenant upon which the matter in controversy turned was contained in a deed made on the dissolution of a partnership between two partners, the plaintiff and defendant, and it provided that the defendant should not during a certain period be at liberty to sell the whole or part of the tea crops of two estates named to any person other than the plaintiff without first offering to him the option of buying the same, and further provided that on breach of this covenant by the defendant he should pay to the petitioner the sum of 500*l.* as " liquidated damages and not as a penalty."

Now, it will be observed that this covenant would be violated by the sale of any appreciable part, in a business point of view, of the crops of either of these estates, no matter how relatively

(1) [1896] 1 Q. B. 626, at p. 630. (2) [1905] A. C. 6.
(3) [1912] A. C. 394.

small that part might be compared with the entire crop of either. It is also clear that the object of the parties when they executed the deed was to secure to the plaintiff the option of buying the entire crops of both estates, and that when they fixed this sum of 500*l.* they were thinking of the loss the plaintiff might sustain by the loss of that option. The amount of tea sold by the defendant in breach of the covenant was considerable —nearly 54,000 lbs. It was laid down that in determining whether a sum contracted to be paid is liquidated damages or a penalty, one is to consider whether the contract, whatever its language, would, at the time it was entered into, have been unconscionable and extravagant, and one which no Court ought to allow to be enforced if this sum were to be treated as liquidated damages, having regard to any possible amount of damage likely to have been in the contemplation of the parties when they made the contract. At p. 398, Lord Mersey, in delivering the judgment of the Judicial Committee, said: "When making the contract it was impossible to foresee the extent of the injury which might be sustained by the plaintiff if sales of the tea were made to third parties without his consent. That such sales might seriously affect his business was obvious, and the very uncertainty of the loss likely to arise made it most reasonable for the parties to agree beforehand as to what the damages should be. And, furthermore, it is well known that damages of this kind, though very real, may be difficult of proof, and that the proof may entail considerable expense." Those remarks are, having regard to the evidence in the present case, particularly applicable to it.

In *Kemble* v. *Farren* (1) Tindal C.J. said: "We see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases, it saves the expense and difficulty of bringing witnesses to that point."

Therefore, although it may be true, as laid down by Lord Watson, that a presumption is raised in favour of a penalty

(1) 6 Bing. 141, at p. 148.

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where a single lump sum is to be paid by way of compensation in respect of many different events, some occasioning serious, some trifling damage, it seems to me that that presumption is rebutted by the very fact that the damage caused by each and every one of those events, however varying in importance, may be of such an uncertain nature that it cannot be accurately ascertained. The damage has been proved to be of that nature in the present case, and the very fact that it is so renders it all the more probable that the sum of 5*l.* was not stipulated for merely in terrorem, but was really and genuinely a pre-estimate of the appellants' probable or possible interest in the due performance of the contract.

Swinfen Eady L.J. holds that clause No. 5 of the agreement applies to the first part of clause 3, the supplying of these goods to persons on the appellants' black list, as it was styled. I confess that seems to me a very, very doubtful construction. What is prohibited by the second clause is "the sale or offering for sale of motor tyres, covers, or tubes at prices less than those in the price list." What is dealt with in clause 5 is a sale or offering for sale of these particular kinds of goods in breach of the agreement. What is dealt with in the first part of clause 3 is the supply without consent of any such goods to these black-listed agents at any price whatever; but even if Swinfen Eady L.J. should be right in this it would not lead me to a conclusion different from that to which I have come.

The appellants, like the respondents, are most probably good business men. Neither of them contemplated, presumably, the black-listing of these agents without adequate trade reasons. Nothing was more natural than that the appellants should seek to prevent the supply of their goods indirectly to persons to whom they would not supply them directly. Considerable injury to their trade interests might obviously be done by putting such persons in a position to undercut their prices, and derange their supply organization, and nothing conceivable could be more difficult than to prove by evidence, or to estimate precisely in money, the exact amount of damages which might be caused by such an injury. The passage in the judgment of Tindal C.J., above quoted, applies directly to such state of things.

I entirely concur with Kennedy L.J. in his criticism of the agreement to be found at p. 134 of the appendix. I agree with him that on the face of it, on this point of liquidated damages, it contains nothing unreasonable, unconscionable, or extravagant. And I further think that the same may be said of the real transaction between the parties if its substance be reasonably regarded.

For these reasons I think that the judgment of Kennedy L.J. was right, that the judgment appealed from was wrong and should be reversed, and the judgment of Phillimore J. be restored, and the appeal allowed with costs.

LORD PARKER OF WADDINGTON. (1) My Lords, where the damages which may arise out a breach of contract are in their nature uncertain, the law permits the parties to agree beforehand the amount to be paid on such breach. Whether the parties have so agreed or whether the sum agreed to be paid on the breach is really a penalty must depend on the circumstances of each particular case. There are, however, certain general considerations which have to be borne in mind in determining the question. If, for example, the sum agreed to be paid is in excess of any actual damage which can possibly, or even probably, arise from the breach, the possibility of the parties having made a bona fide pre-estimate of damage has always been held to be excluded, and it is the same if they have stipulated for the payment of a larger sum in the event of breach of an agreement for the payment of a smaller sum.

The really difficult cases are those in which the Court has to consider what presumptions or inferences arise from the number or nature of the stipulations on breach of which the sum in question is agreed to be paid. In the case of a single stipulation, which, if broken at all, can be broken once only, and in one way only, such as a covenant not to reveal a trade secret to a rival trader, there can be no inference or presumption that the sum payable on breach is not in the nature of agreed damages, and if the parties have referred to it as agreed or liquidated damages, no reason why the Court should not treat it as such. The

(1) Read by Lord Shaw of Dunfermline.

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question is more complicated when the stipulation, though still a single stipulation, is capable of being broken more than once, and in more ways than one, such as a stipulation not to solicit the customers of a firm. A solicitation which is unsuccessful can give rise to only nominal damages, and even if it be successful, the actual damage may vary greatly according to the value of the custom which is thereby directly or indirectly lost to the firm. Still, whatever damage there is must be the same in kind for every possible breach, and the fact that it may vary in amount for each particular breach has never been held to raise any presumption or inference that the sum agreed to be paid is a penalty, at any rate in cases where the parties have referred to it as agreed or liquidated damages.

The question becomes still more complicated where a single sum is agreed to be paid on the breach of a number of stipulations of varying importance. It is said that in such a case there arises an inference or presumption against the sum in question being in the nature of agreed damages, even though the parties have referred to it as such. My Lords, in this respect I think a distinction should be drawn between cases in which the damage likely to accrue from each stipulation is the same in kind and cases in which the damage likely to accrue varies in kind with each stipulation. Cases of the former class seem to me to be completely analogous to those of a single stipulation, which can be broken in various ways and with varying damage; but probably it would be difficult for the Court to hold that the parties had pre-estimated the damage if they have referred to the sum payable as a penalty.

In cases, however, of the latter class, I am inclined to think that the prima facie presumption or inference is against the parties having pre-estimated the damage, even though the sum payable is referred to as agreed or liquidated damages. The damage likely to accrue from breaches of the various stipulations being in kind different, a separate pre-estimate in the case of each stipulation would be necessary, and it would not be very likely that the same result would be arrived at in respect of each kind of damage. In my opinion, however, any such presumption or inference would be prima facie only and capable of being

displaced by other considerations. Supposing it were recited in the agreement that the parties had estimated the probable damage from a breach of one stipulation at from 5*l.* to 15*l.*, and the probable damage from a breach of another stipulation at from 2*l.* to 12*l.*, and had agreed on a sum of 8*l.* as a reasonable sum to be paid on the breach of either stipulation, I cannot think that the Court would refuse to give effect to the bargain between the parties.

My Lords, in the present case, even accepting the construction of the contract which makes clause 5 apply not only to a sale or offer contrary to the provisions of clause 2, but also to one contrary to the provisions of clause 3, I think it is reasonably clear that the damage likely to accrue from the breach of every stipulation to which clause 5 applies is the same in kind. Such damage will in every case consist in the disturbance or derangement of the system of distribution by means of which the appellants' goods reach the ultimate consumer. The parties by their contract agree that the sum payable on breach of any such stipulation is to be paid by way of damages and not by way of penalty, and I can see nothing to justify the Court in refusing to give effect to this bargain.

LORD PARMOOR. My Lords, on April 7, 1911, Messrs. A. Pellant, Limited (acting as agents for the appellants), entered into a price maintenance agreement with the respondents. The question to determine is the construction of this agreement.

In the fifth clause the respondents agreed to pay to the appellants "the sum of 5*l.* for each and every tyre, cover, or tube sold or offered in breach of this agreement, as and by way of liquidated damages, and not as a penalty." There has been difference of opinion whether the sum of 5*l.* is applicable only to a breach of the conditions contained in paragraph 2 of the agreement or extends to a breach of other conditions not contained in this paragraph.

Paragraph 2 contains an undertaking by the respondents that they "will not sell or offer any Dunlop motor tyres, covers, or tubes to any private customers or to any co-operative society at prices below those mentioned in the price list current at the time

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of sale, nor give to any such customer or society any cash or other discounts, or advantages reducing the same, and will not sell or offer any Dunlop motor tyres, covers, or tubes to any other person, firm, or company at prices less than those mentioned in the said price list." I agree with the opinion of Kennedy L.J. that under the terms of the contract the sum of 5*l.* is only payable in respect of a breach of the undertaking in paragraph 2 of the contract, and does not extend to other breaches. I further agree with the opinion expressed by the Lord Justice, that, within this limitation, clause 5 of the contract does apply to more than one contingency, and that the case must be considered on this basis.

It was held by the Court of Appeal that although the sum of 5*l.* was agreed between the parties to be by way of liquidated damages and not as a penalty, yet it must be regarded as a penalty; that the appellants could not recover any greater damages for breach of the agreement in the sale or offering of any tyre, cover, or tube than such damage as they could prove that they had sustained; since they could not prove that they had sustained actual damage, they were not entitled to more than nominal damages. It is against this decision that the appeal is brought to your Lordships' House.

My Lords, there is no question as to the competency of parties to agree beforehand the amount of damages, uncertain in their nature, payable on the breach of a contract. There are cases, however, in which the Courts have interfered with the free right of contract, although the parties have specified the definite sum agreed on by them to be in the nature of liquidated damages, and not of a penalty. If the Court, after looking at the language of the contract, the character of the transaction, and the circumstances under which it was entered into, comes to the conclusion that the parties have made a mistake in calling the agreed sum liquidated damages, and that such sum is not really a pactional pre-estimate of loss within the contemplation of the parties at the time when the arrangement was made, but a penal sum inserted as a punishment on the defaulter irrespective of the amount of any loss which could at the time have been in contemplation of the parties, then such sum is a penalty, and the

defaulter is only liable in respect of damages which can be proved against him. It is too late to question whether such interference with the language of a contract can be justified on any rational principle.

There are two instances in which the Court has interfered when the agreed sum is referable to the breach of a single stipulation. It is important that the principle of interference should not be extended. The agreed sum, though described in the contract as liquidated damages, is held to be a penalty if it is extravagant or unconscionable in relation to any possible amount of damages that could have been within the contemplation of the parties at the time when the contract was made. No abstract rule can be laid down without reference to the special facts of the particular case, but when competent parties by free contract are purporting to agree a sum as liquidated damages there is no reason for refusing a wide limit of discretion. To justify interference there must be an extravagant disproportion between the agreed sum and the amount of any damage capable of pre-estimate. In the case of *Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda* (1) Lord Halsbury gives an apt illustration of what would probably render a sum agreed by the parties unconscionable, and therefore a penalty: "For instance, if you agreed to build a house in a year, and agreed that if you did not build the house for 50*l.* you were to pay a million of money as a penalty, the extravagance of that would be at once apparent."

In the present case the definite sum agreed by the parties is 5*l.*, and this cannot be said to be extravagant or extortionate, having regard to the nature of the contract.

The second instance in which the Courts have sanctioned interference is in the case of a covenant for a fixed sum, or for a sum definitely ascertainable, and where a larger sum is inserted by arrangement between the parties, payable as liquidated damages in default of payment. Since the damage for the breach of covenant is in such cases by English law capable of exact definition, the substitution of a larger sum as liquidated damages is regarded, not as a pre-estimate of damage, but as a penalty in the

(1) [1905] A. C 6.

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nature of a penal payment. In the present case this limitation has no application. It cannot be said that the sum of 5*l.* is being substituted for the payment of a smaller fixed or ascertainable sum, since from the nature of this contract any accurate pre-estimate of damage would be practically impossible. The words of Tindal C.J. in the case of *Kemble* v. *Farren* (1) are directly applicable: "We see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases, it saves the expense and difficulty of bringing witnesses to that point."

My Lords, the point on which the majority of the Court of Appeal decided this case against the appellants is that, where a contract contains varying stipulations, and the evidence shows that these stipulations are of varying degrees of importance, the Court exercises a wider power of interference, and a single sum made payable by the occurrence of the breach of one or more, or all of such stipulations, is prima facie a penalty and not liquidated damages. If this statement of the law is accurate without limitation, the agreed sum of 5*l.* in the present case would be in the nature of a penalty, since that sum is fixed irrespective of the varying degrees of importance of the stipulations. I agree with Kennedy L.J., that though the fact that the agreed sum covers more than one event is an element in the case, or may constitute a presumption that it is a penalty, it is in no sense conclusive against such sum being treated as liquidated damages. There may be a greater risk of infringing the principle against extortion, or against the substitution of a larger for a smaller payment, in applying the same figure to a number of different breaches of varying importance, more especially if some occasion serious and others but trifling damage, than when it is applied to one breach; but if these tests are complied with the parties may reasonably be allowed to make their own agreement. No doubt if the agreed sum is not applied distributively, but equally to stipulations of varying importance, and in reference to any of the stipulations it

(1) 6 Bing. 141, at p. 148.

is a penalty, it is a penalty for the purpose of the whole contract, since it could not in the same contract be construed both as a penalty and as liquidated damages.

If the same agreed sum, separately allocated in different agreements to breaches of varying importance, could be properly construed as a pre-estimate of damage, it seems illogical to regard such sum as a penal payment because for convenience or economy the whole transaction is included in one agreement. The present case is an illustration in point. Having regard to the character of the contract, it would have been possible to have a series of contracts applicable to the various stipulations, and to have inserted in each of them a sum of 5*l.* as liquidated damages to compensate a loss uncertain, and practically incapable of ascertainment, at the time when the contract was made. I can see no reason why the parties should not be allowed to contract in one document instead of several, or that in such a case the law should interfere with freedom of contract.

Swinfen Eady L.J. in the Court of Appeal largely bases his judgment on the case of *Willson* v. *Love*. (1) In that case there was a covenant by the lessees of a farm not to sell hay or straw off the premises during the last twelve months of the term, and a provision that an additional rent of 3*l.* per ton should be payable by way of penalty for every ton of hay or straw so sold. There was a substantial difference between the manurial value of hay and that of straw, and it was held that the sum so made payable was a penalty and not liquidated damages.

It is noticeable in this case that the parties expressed the sum to be a penalty, and not liquidated damages, but in giving judgment A. L. Smith L.J. says: "Where a sum is made payable by a contract to secure the performance of several stipulations, the damages for the breach of which respectively must be substantially different, or, in other words, the performance of stipulations of varying degrees of importance, that sum is prima facie to be regarded as a penalty and not as liquidated damages." If the words "prima facie" only apply to a presumption which can be displaced, then I agree with Kennedy L.J. that the presumption is displaced in the present case, which belongs to a class in which

(1) [1896] 1 Q. B. 626.

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it is practically impossible to make an accurate pre-estimate of damage, and there is no question of extortion or of substituting a larger for a smaller sum. But if the words "prima facie" imply that the sum will be regarded as a penalty unless there are some special circumstances which could justify an opposite conclusion the statement appears to be expressed in too general terms.

In the case of *Wallis* v. *Smith* (1), tried before Fry J., and taken to the Court of Appeal, it was necessary to decide whether when a contract contained a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of money, the sum named should be treated as liquidated damages or as a penalty. All the previous cases were examined in the Court of Appeal, and the Court unanimously confirmed the judgment of Fry J., that the agreed sum was not a penalty but liquidated damages. Lindley L.J. says (2): "When I come to look at the cases I cannot find a single case in which the larger sum has been treated as penalty where there has been no smaller sum ascertainable as the amount of damages."

Cotton L.J. says (3): "There are a number of covenants to which clause 25 applies, and in respect of the breach of which it is said that 5000*l.* shall be liquidated damages. Now in what cases have the Courts said that in those circumstances you shall construe the words 'liquidated damages,' not as what they mean—as a sum assessed between the parties—but only as a penal sum, leaving the real damages to be ascertained? Undoubtedly the authorities do say this, that when a stipulation applies to a breach of a number of covenants, and one of those is a covenant for the payment of a sum of money where the damage for the breach of it is according to English law capable of being actually defined, then where a sum is said to be liquidated damages the stipulation applies, not distributively to the different covenants but equally to all, and you must hold that the sum cannot be damages assessed by the parties as in the case of a particular covenant with respect to which the damages are incapable of being ascertained and are by law fixed in a different way; but

(1) 21 Ch. D. 243. (2) 21 Ch. D. at p. 275.
(3) 21 Ch. D. at p. 268.

you must look upon it as a mere penalty, and ascertain when the breach occurs what is the damage sustained in respect of the particular breach."

In the present case there is no question of extortion or of giving a larger sum as liquidated damages for a fixed or ascertainable sum, in reference to any of the stipulations to which the agreed figure is applicable, and no ground for altering the terms of the contract as arranged by the parties. The parties adopted a wise and prudent course, having regard to the nature of the contract and the practical impossibility of an accurate ascertainment of damages.

My Lords, in my opinion this appeal should be allowed with costs.

Order of the Court of Appeal reversed and order of Phillimore J. thereby in part set aside restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, July 1, 1914.

Solicitors for appellants: *John B. & F. Purchase.*
Solicitor for respondents: *John Hands.*

[HOUSE OF LORDS.]

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FARMERS' MART, LIMITED . . . . . APPELLANTS;

AND

MILNE . . . . . RESPONDENT.

Contract—Illegality—Bankruptcy—Fraud on Bankruptcy Laws—Contract of Employment—Liberty to Employee to undertake Trusteeships in Bankruptcy—Agreement to pay Employer's Debt in full out of Trustee's Remuneration.

By an agreement of employment between a firm of land agents and their manager it was provided that the manager should be entitled, with the consent of the firm, to undertake any factorship or trusteeship, and that all fees which he derived from any such office should be pooled with all fees which the firm derived as salesmen or valuators in connection with any such estate, and that the proceeds, after payment thereout to the firm of the balance of any debt due to them from such estate after giving credit for any sums received by them on account of such debt, should be divided equally between the parties. Under this agreement the manager was appointed trustee of several bankrupt estates, including an estate on which his firm had a claim as creditors. In an action of accounting against their manager the firm sought to recover a proportion of the fees earned by the manager as such trustee and the balance of the debt due to them after deducting the amount received by them by way of dividend from the bankrupt's estate:—

Held, that the agreement was illegal and that the action was not maintainable.

Decision of the Second Division of the Court of Session in Scotland, 1914 S. C. 129, affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary. (1)

The appellants brought an action of accounting against the respondent on the basis of an agreement dated April 9, 1907. The defence to the action was that the agreement was void as against public policy.

The appellants were a limited company carrying on business

* *Present:* LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

(1) 1914 S. C. 129.

as auctioneers, agents, live stock salesmen, appraisers, and land surveyors at Brechin and elsewhere.

The respondent was employed under the said agreement as manager of the appellants' business from April, 1907, until August, 1908, when his engagement terminated, at a salary of 300*l.* a year with an allowance of 50*l.* a year for personal expenses.

Article 5 of the agreement provided as follows :—

"The second party" (the respondent) "shall be entitled but shall not be bound to undertake any factorship, or trusteeship on, or other office involving the management of any estate, provided always that before undertaking any such factorship, trusteeship, or office he shall first obtain the consent of the first parties" (the appellants), "unless in the case of a testamentary or other gratuitous trusteeship, executorship, or factorship, any of which he shall be entitled to accept without the consent of the first parties. The fees or other remuneration derived by the second party from any such factorship, trusteeship, or office as aforesaid, accepted by the second party, after the commencement of this agreement, shall (after deduction therefrom of all charges and other out-of-pocket expenses incurred by the second party in connection therewith, and that whether by way of legal, clerical, or other assistance or otherwise) be pooled with all fees and commissions, including fees for measurements, derived by the first parties from any sales or valuations in connection with any such estate under the management of the second party as aforesaid, and the proceeds thereof shall be divided in the proportion of one half to the first parties and the other half to the second party, provided always that before any such division shall take place there shall out of said proceeds be paid to the first parties the balance of any debt remaining due to them from such estate after giving credit for all sums received or falling to be received on account of such debt, and that whether from the principal, or any subsidiary or collateral, obligant therefor, or from the respective estate of any such obligants."

The facts averred by the pursuers in their condescendence were as follows :—

On June 14, 1907, the respondent, with the appellants'

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consent, was appointed trustee for behoof of the creditors of John Fairweather, farmer, Langhaugh, by Brechin, under a trust deed of that date granted by Fairweather in the respondent's favour. The respondent had since realized the whole of the trust estate and had received the sum of 219*l.* 4*s.* in respect of commissions as trustee on the estate. The appellants had received commissions on various sales and purchases in connection with the trust estate amounting to 92*l.* 17*s.* 1*d.* The appellants had also a claim on the estate as creditors for 283*l.* 9*s.* 6*d.*, in respect of which dividends amounting to 115*l.* 0*s.* 10*d.* had been received by them, leaving a balance of 168*l.* 8*s.* 8*d.* The appellants, in pursuance of article 5 of the agreement, claimed that their commissions of 92*l.* 17*s.* 1*d.* and the respondent's commissions of 219*l.* 4*s.* should be pooled, making a total of 312*l.* 1*s.* 1*d.*, and that after deducting therefrom the balance of 168*l.* 8*s.* 8*d.* in respect of their claim as creditors on the estate the net sum of 143*l.* 12*s.* 5*d.* should be divided equally between them. The respondent by his answers objected that such a transaction, if carried out, would be a fraud upon the other creditors, who accepted their dividends in the belief that all the creditors, including the appellants, were receiving equality of treatment from the respondent as trustee, whereas in fact the appellants would be receiving payment of their claim as creditors in full.

The respondent was also appointed, with the appellants' consent, to the office of trustee, factor, or other office involving the management of several other estates, including the office of factor and trustee upon the sequestrated estates of Stewart Dick, farmer, tenant of Broomknowe Farm in the parish of Aberlemno, Forfarshire, upon which he was appointed on April 20, 1908, and early in 1908 he was, with the appellants' consent, appointed trustee for behoof of the creditors of Walter Crocket, butcher, Brechin, under a trust deed granted by him. The respondent had realized these estates, and had derived various sums as fees or other remuneration for his actings in connection therewith during the period of his engagement with the appellants. The appellants had called upon the respondent to account in terms of article 5 of the agreement for the fees or other remuneration

received by him in respect of the several above-mentioned trusteeships up to the date of the termination of his engagement, but the respondent refused to do so.

The first plea in law for the appellants (the pursuers) was as follows:—

"The defender being bound under and in terms of the said agreement of 9th April, 1907, and in particular article fifth thereof, to account to the pursuers for all fees or other remuneration derived by him (*a*) from his said trusteeship on the trust estate of the said John Fairweather, and (*b*) in connection with the office of factor, trustee, or other office involving the management of any other estate undertaken by the defender during the period up to 19th August, 1908, the pursuers are entitled to decree of accounting as concluded for, and, on the balances due to the pursuers being ascertained in terms of said agreement, they are entitled to decree for the same."

The first and third pleas in law for the respondent (the defender) were as follows:—

"1. The averments of the pursuers being irrelevant and insufficient to support the conclusions of the summons, the defender is entitled to absolvitor.

"3. The agreement founded upon by the pursuers being void in respect it is corrupt and illegal, the pursuers cannot maintain the present action, and the same ought to be dismissed."

The Lord Ordinary (Lord Hunter) repelled the first and third pleas of the respondent and ordered accounts to be lodged by the respondent in terms of the conclusions of the summons, but the Second Division (the Lord Justice-Clerk, Lord Dundas, and Lord Guthrie) reversed the decision of the Lord Ordinary, and held that the agreement was illegal and dismissed the action.

1914. July 14, 16. *Holman Gregory, K.C.*, and *William Mitchell* (*Condie Sandeman, K.C.*, with them) (the two latter of the Scottish Bar), for the appellants. This agreement is in scope and intention a legal one and was so treated by the parties. The alleged illegality does not consist in the agreement itself but in the mode of carrying it out, but there is no suggestion that any wrong has been done under this agreement, and where the

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circumstances are equally consistent with legality and illegality the law presumes against illegality: *Hire Purchase Furnishing Co.* v. *Richens* (1); *Waugh* v. *Morris.* (2) The agreement imposed no obligation on the respondent either to undertake any trusteeship or factorship or to employ the appellants to do work for the trust estate, and there was no illegality in the parties arranging to pool the commissions arising from work done in connection with the trust estate. Nor is there any ground for the suggestion that the agreement is an interference with the bankruptcy laws, for the proceeds out of which the appellants were to be paid the balance of any debt due to them from the trust estate were in no sense assets of the estate. Moreover if the agreement is to be set aside by any one it must be by the creditors.

Younger, K.C., and *G. W. Wilton* (the latter of the Scottish and also of the English Bar), for the respondent. The maxim "Ex turpi causa non oritur actio" is an answer to the appellants' claim. This agreement has been de facto carried out illegally, and the objection that the creditors of the bankrupt are alone concerned with this question is not well founded, since the Court will refuse to assist any one to enforce an illegal or immoral contract, not for the sake of the defendant, but on the ground of public policy: *Holman* v. *Johnson.* (3) The stipulation as to pooling the fees arising from the bankruptcy is not in itself open to objection, but the stipulation that the appellants are to be first paid in full out of the proceeds any debt due to them from the bankrupt's estate is contrary to the policy of the bankruptcy laws. The trustee is elected by the creditors, and the effect of this stipulation is to give the appellants an interest in electing their manager. In Fairweather's case the appellants, being creditors of the estate, were employed by the trustee, the respondent, to do work in connection with the bankruptcy behind the back of the other creditors and as the result of such employment were to receive an advantage over the other creditors, namely, payment of 20*s.* in the pound out of the pooled proceeds of their own and the trustee's commissions, it being the duty of the trustee to see that the funds are available for distribution among

(1) (1887) 20 Q. B. D. 387.
(2) (1873) L. R. 8 Q. B. 202, at p. 208.
(3) (1775) 1 Cowp. 341.

the creditors pari passu. In claiming to enforce this transaction the appellants are seeking to carry out the agreement in an illegal manner. There was here a bargain to commit an illegality. *M'Gown* v. *Tod* (1) is precisely in point.

Holman Gregory, K.C., in reply, cited *Lewis* v. *Davison*. (2)

Lord Dunedin. My Lords, in this case the pursuers and appellants are a firm of auctioneers who carry on business also as valuers, and they made an agreement with the defender, the respondent, to act for them as manager. The agreement dealt with the terms of his employment and included a fifth clause upon which the question arises. [His Lordship read the clause.]

My Lords, the effect of that agreement is not doubtful. If the defender acted as a trustee in a sequestration he would in terms of this agreement be bound to put the fees that he got as remuneration as trustee into a pool with any fees which they, the pursuers, got for employment which he gave them as trustee, and then in the division there would not be absolutely equal division of those pooled fees, but before anything else the pursuers, if they were creditors under the estate on which he was a trustee, would receive such an allowance over and above the dividends which they would get in common with ordinary creditors as would give them 20*s*. in the pound. The action is raised in form for a count and reckoning by the pursuers against the defender in which he is asked for a count and reckoning of the particulars set forth of three particular occasions on which he acted as trustee and in respect of which transactions they say there is money due to them upon an accounting if the accounting is worked out in terms of that very clause which I have just read. To that action the defender pled by his third plea that "The agreement founded upon by the pursuers being void in respect it is corrupt and illegal, the pursuers cannot maintain the present action, and the same ought to be dismissed"; and that is the plea to which the learned judges of the Second Division have given effect.

My Lords, as to the general proposition that you cannot sue pon an illegal contract there is of course no doubt; the question

(1) F. C. Dec. 13, 1808. (2) (1839) 8 L. J. (Ex.) 78.

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is whether a contract of this sort is an illegal contract. Now taking it upon Scotch authority first, before coming to English authority, I find that the matter is very clearly dealt with, as it always is, by Mr. Bell in his "Principles." After stating that there are such things as illegal and immoral contracts, he deals in s. 37 with contracts void at common law. He first sets forth contracts properly immoral, contra bonos mores, then certain rules as to pactum illicitum, and so on, and then he says this: "Contracts for indecent or mischievous purposes or considerations, or prejudicial or offensive to the public or to third parties, or inconsistent with public law or arrangements are invalid." One best sees what is the true meaning of the words he there uses by going to the illustrations that he gives in the note in which he sets forth the cases on which his proposition is founded, and in the clause which I have read, "prejudicial or offensive to the public or to third parties," he adds this: "such are, e.g., agreements in which a creditor in fraud of an agreement to accept a composition stipulates for a preference to himself"; and he gives a reference to his well-known work, the large work, "Commentaries on the Law of Scotland." Now the "Commentaries" give more than one illustration of this matter. They give the one I have just read and they give also a case where a creditor has got a sum in order to accede to a trust; that is a case, not of regular sequestration, but of private arrangement with the creditor where his concurrence has been bought. And another very good instance of the same thing is given by a case which is referred to in Lord Hunter's judgment and has been cited to your Lordships, the case of *M'Gown* in the Faculty Collection (December 13, 1808, F.C.).

Now, my Lords, the truth is that a case of this sort really comes in either division; it is not only prejudicial to third parties, but it is inconsistent with public law and arrangements; and it is equally inconsistent with public law and arrangements whether it contravenes an actual section of the Bankruptcy Act, of which *Thomas* v. *Waddell* (1) may be taken as an example, or whether it goes against those general principles which are just as much applied to private arrangements in Scotland, such as trust deeds,

(1) (1869) 7 M. 558.

as they are to the general arrangements which are prescribed in a sequestration.

My Lords, I have so far kept only to Scotch authority. In English authority the matter is dealt with in precisely the same way. I note in the admirable work on Contracts by Sir Frederick Pollock, 8th ed., p. 292, that he expresses the matter in almost the same terms as Mr. Bell, where he says, "An agreement will generally be illegal, though the matter of it may not be an indictable offence, and though the formation of it may not amount to the offence of conspiracy, if it contemplates any civil injury to third persons." And then he goes on and points out that when you come to this question of agreement in fraud of creditors you may really look at it from either point of view,—either bearing directly on the sentence I have just read, or bearing on the general idea of being an interference with general arrangement of justice. So that, my Lords, if you look at the agreement and take it as it stands, with this provision that in certain circumstances, that is to say, whenever these people are creditors, they are to eke out their dividends by getting from the trustee part of his remuneration, I think it is clearly an illegal bargain.

But, my Lords, that does not quite end the matter, because it might be said that the persons who really are prejudiced in this way are the other creditors, and this is not a matter with which the defenders have anything to do. My Lords, there again I think the matter has been settled by a long course of decisions. The test was laid down so long ago as 1816 in the case of *Simpson* v. *Bloss* (1), and the head-note there expresses it perfectly correctly: "The test, whether a demand connected with an illegal transaction, is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his case." The same thing was again said in the celebrated case of *Fivaz* v. *Nicholls*. (2) Tindal C.J. says: "I think that this case may be determined on the short ground that the plaintiff is unable to establish his claim as stated upon the record, without relying upon the illegal agreement originally entered into between himself and the defendant." It was

(1) (1816) 7 Taunt. 246. (2) (1846) 2 C. B. 501, at p. 512.

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repeated again in 1869 in the case of *Taylor* v. *Chester* (1), where Mellor J. says: "The true test for determining whether or not the plaintiff and the defendant were in pari delicto" (he is there referring to the words of Lord Mansfield in the leading case of *Holman* v. *Johnson* (2), which was quoted to your Lordships), "is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party." And it was again applied in the case of *Scott* v. *Brown*. (3)

Now, my Lords, taking that test here it seems to me to solve the whole matter. The pursuers have solved it for themselves, because they cannot get the accounting they seek without getting it through the aid of that very clause which I have already said was illegal: they want that very clause to help them. And it is this test that really turns the flank of all those cases which have been quoted by Mr. Holman Gregory. There are certain cases where an agreement is so divisible that it may be that the pursuer, or plaintiff, can enforce his demand without having recourse to the illegal part of the agreement; but here they cannot do so, because the only reason why they want this accounting is in order that when the money has been pooled they may be allowed to get 20*s*. in the pound, and that in these three transactions set forth.

My Lords, on the whole matter I am of opinion that the judgment appealed from is right, and I move your Lordships that the appeal be dismissed with costs.

LORD ATKINSON. My Lords, I entirely concur. I think this is a case of great simplicity. The pursuers sue for an account of certain moneys received by the defender, and they base their right to get an account on a certain clause in this agreement. The money in respect of which they ask for an account is money received in three bankruptcy matters in which the defender was trustee. It is alleged that there were other bankruptcy matters in which he was also trustee, but they are not specifically mentioned. The pursuers, however, sue

(1) (1869) L. R. 4 Q. B. 309, at p. 314.
(2) 1 Cowp. 341.
(3) [1892] 2 Q. B. 724, at p. 732.

for an account in reference to the moneys he received as trustee.

Now what is the particular clause of this agreement on which they base their right to that relief? There may be a dozen other clauses on which they would have other relief, but the particular clause they wish to enforce in this suit, and upon which they base their right to the relief that they claim, is the fifth clause, which to my mind simply embodies a device arranged between the pursuers and the defender, in fraud of the bankruptcy laws, to secure to the pursuers a larger dividend than the other creditors in that estate are to receive. It is that, and nothing less. The provision is that this gentleman cannot act as trustee without their consent, and the clause of the agreement on which they rest their case might, I think, be conveniently stated thus: that in consideration that they would consent to the defender acting as trustee in certain bankruptcy matters in which they were creditors, he would allow part of his remuneration, which was paid out of the assets, to be applied in securing to the pursuers a larger dividend than the other creditors in those bankruptcy matters were to receive.

My Lords, I have not the slightest hesitation in holding that such an agreement is a fraud upon the bankruptcy laws, the great object of which, as distinguished from the Statute of Elizabeth, is not merely to secure that the assets of a bankrupt shall be distributed amongst his creditors, but that they shall also be distributed equally. Equality is the great object and virtue of the Bankruptcy Acts. It is to defeat that equality that this agreement was entered into.

My Lords, for that, and for other reasons which have been given by the noble and learned Lord on the woolsack at greater length, I have no hesitation whatever in saying that this is an agreement which should not be enforced. The appeal should, I think, be dismissed, and the judgment below affirmed.

Lord Shaw of Dunfermline. My Lords, this is an appeal from a decision of the Second Division of the Court of Session. Having looked carefully through the judgments of the learned Lords I agree with the conclusion reached therein. But I do

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not find myself in agreement with the opinions and grounds of judgment stated by their Lordships, and it is only in view of this that I venture to add any observations of my own.

My Lords, I agree with my noble and learned friends who have preceded me. I think this action is pivoted upon one fact and essentially in so far as it is relevant upon one fact alone. It is an action directed by the former employers of the respondent, Mr. Milne, in order to obtain from him an accounting with regard to certain receipts that he obtained in respect of transactions carried out under the terms of a certain agreement. That agreement under head 5 provides that Mr. Milne, being the acting manager and valuator and auctioneer for this Farmers' Mart, should be entitled to accept trusteeships under arrangement with creditors, or under bankruptcy, and that his fees as trustee should be dealt with in the manner to which I will presently allude. In clause 5 it is provided that being trustee of those estates he shall, although there is no clause compelling him to do so, be entitled to employ his own firm for all purposes of valuations and the like.

My Lords, the judgments in the Court below, in my opinion most unfortunately, give prominence, and, in the case of the Inner House, give entire prominence, to the relations thus existing between Mr. Milne and his firm; and the ground upon which this agreement is said by the Second Division to be an improper arrangement which cannot be maintained is a ground of what their Lordships call double interest.

My Lords, there are many cases in Scotland in which one member of a legal firm or a member of a firm of accountants becomes a trustee in bankruptcy also; and I have listened with some surprise to the argument that because the firm is employed, without any suggestion of overcharges or the like, in the business of the trust or the bankrupt's estate, therefore a double interest has been created which gives a title to void the entire bargain under which remuneration was agreed to be paid.

My Lords, all I will say upon that head at present is this: that in affirming the conclusion reached by the Second Division I must not (and I assume your Lordships are in the same position) be held to commit myself to any one of the propositions under

which the Second Division reached that conclusion. It would require a very great deal of argument, as I am at present advised, to enable me to assent to the general and somewhat astonishing proposition of the Lord Justice-Clerk that "A contract of this kind may be innocent in the sense that it may be possible to carry it out without committing any illegality"; and his Lordship proceeds to say that if an innocent contract which might be carried out without any illegality might also be carried out by way of illegality, the contract itself is a void contract. My Lords, in building transactions there are what are known as time and lime contracts. In many transactions in which tradesmen are employed the customer is at the mercy of a tradesman, who, if he be dishonest, can act illegally and make overcharges and the like. There is hardly any innocent contract for the doing of an act or rendering of a service which may not, by reason of dishonesty, be converted into something improper. But, my Lords, I have never yet heard it suggested that that is a reason for voiding such a contract. And, my Lords, I withhold my assent entirely from the argument contained in the judgments both of the Lord Justice-Clerk and of Lord Guthrie under the head of there being that double interest which made this contract a voidable bargain.

But, my Lords, there is a much simpler approach to real justice in this case, and it is that which I am glad to think your Lordships have taken. Under head 5 of this agreement it is provided that when the fees of the trustee in bankruptcy come to be pooled along with the auctioneering and other charges of the firm by which he was employed, then out of these proceeds there shall be paid to the first parties—that is to say to the appellants—the balance of any debt remaining due to them from such estate. I agree with my noble and learned friend Lord Atkinson in the language he has just employed. That is a bargain of an illicit character.

My Lords, this does not depend in Scotland on any Act of Parliament; although if the statute of 1856 and other Bankruptcy Acts were applied to it it would be found that there is confirmation, in every line of those provisions against illegal preferences, of the proposition that when once an estate is thrown into

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bankruptcy every creditor upon that estate is entitled in the distribution of its assets to equal terms and nothing but equal terms. Special preferences created under special contracts or by special circumstances there may be, but that is the general rule. But equality of treatment, my Lords, is destroyed, if in respect of any services rendered by the trustee he has a private bargain with certain creditors that out of his fees they shall be preferred as to the balance unpaid to them out of the estate in general. It is manifest that the trustee in such circumstances is in the position of having to distribute a part of his fees to one set of creditors in preference to others. If that part of his fees was distributable among creditors at all it was distributable among the whole body. Accordingly on that ground I should be prepared to affirm the conclusion reached by the learned Lords of the Second Division, although by no means any of the reasons assigned in their judgments.

My Lords, I have dwelt upon this because it occurred to me, when I read the judgment of the Second Division, that this case could surely not have been argued as it was presented at your Lordships' Bar in the Court below. But Mr. Wilton has assured me that it was so argued, and I call your Lordships' attention to a passage in the judgment of Lord Hunter upon this subject. Anything under the hand of Lord Hunter is entitled to great weight, and his Lordship puts the matter in this way: "The stipulation as to the pursuers receiving payment in full of any debt due to them by the bankrupt out of the fees of the defender as trustee appears to me to be an unfortunate condition, but I have not been able to satisfy myself that it is corrupt or of such a character as to justify me in sustaining the defender's plea to the effect of wholly disregarding the agreement between the parties." My Lords, in the view that I take it is much more than an unfortunate condition: it is a condition expressly contrary to that equality of honest distribution of the estate which ought to prevail in all bargains with respect to trusteeships of sequestrated estates in Scotland. Nor may I add have I heard anything in the argument to suggest to me that any different rule from that prevailing north of the Tweed prevails to the south of it.

But Mr. Holman Gregory said, and said with much force, that this occurs only in one clause of the contract, and the action is a general one for count and reckoning and may apply to a series of circumstances in which it did not operate. Most unhappily for such an argument, the language of the condescendence of the pursuers makes this unavailing. I find, my Lords, on a perusal of this record that the broad proposition radically affecting the finance of the matter and the claims of the appellants occurs in condescendence 5, where there is a reference to an unpaid balance of 168*l.* due from the estate of a Mr. John Fairweather. With regard to that unpaid balance, the scheme of the present count and reckoning is this, that that unpaid balance in the language of condescendence 5 "falls to be first paid to the pursuers out of the sums pooled in terms of said article fifth"; that is to say it falls to be paid out of the trustee's own remuneration.

My Lords, I do not think the learned counsel in drawing these pleadings was erroneous when he stated that "such a transaction if carried out would be a fraud upon the other creditors who accepted their dividends in the belief that all the creditors, including the pursuers, were receiving equality of treatment from the defender as trustee." I think, my Lords, that that proposition is sound.

I agree, my Lords, with the conclusion at which your Lordships have arrived.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, July 16, 1914.

Agents for appellants: *Helder, Roberts, Walton & Giles, for Tait & Crichton, W.S., Edinburgh.*

Agents for respondent: *Grahames, Currey & Spens, for John C. Brodie & Sons, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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LOCAL GOVERNMENT BOARD . . . . . APPELLANTS;

AND

ARLIDGE . . . . . RESPONDENT.

Local Government—Dwelling-house—Closing Order—Refusal to determine—Appeal to Local Government Board—Order dismissing Appeal—Procedure—Public Local Inquiry—Right of Appellant to see Inspector's Report—Right of Appellant to be heard orally—Local Government Board Act, 1871 (34 & 35 *Vict. c.* 70), *s.* 5—*Housing, Town Planning, &c., Act*, 1909 (9 *Edw.* 7, *c.* 44), *ss.* 17, 39.

Sect. 17 of the Housing, Town Planning, &c., Act, 1909, authorizes and requires a local authority to make a closing order in respect of any dwelling-house in their district if it appears to them to be unfit for human habitation and to determine such order on being satisfied that such dwelling-house has been rendered fit for human habitation, and gives to the owner of the dwelling-house a right of appeal to the Local Government Board against the closing order and against the refusal to determine the same.

By s. 39 the procedure on any such appeal shall be such as the Local Government Board may by rules determine: provided that the rules shall provide that the Board shall not dismiss any appeal without having first held a public local inquiry, and this provision was contained in rules made under this section by the Local Government Board:—

Held, (1.) that a properly authenticated order of the Local Government Board dismissing an appeal under these sections is not open to objection on the ground that it does not disclose which of the officers of the Board actually decided the appeal; (2.) that an appellant to the Local Government Board is not entitled as of right, as a condition precedent to the dismissal of his appeal, either (*a*) to be heard orally before the deciding officer, or (*b*) to see the report made by the Board's inspector upon the public local inquiry.

Decision of the Court of Appeal [1914] 1 K. B. 160 reversed.

The term "natural justice" examined.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of the Divisional Court. (2)

* *Present:* VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, LORD MOULTON, and LORD PARMOOR.

(1) [1914] 1 K. B. 160. (2) [1913] 1 K. B. 463.

The facts are fully stated in the judgment of the Lord Chancellor, but the following short summary may be useful for the purpose of rendering the arguments intelligible.

The respondent was the assignee of a lease (having more than fifty years to run) of a dwelling-house, No. 83, Palmerston Road, Hampstead.

In January, 1911, the Hampstead Borough Council, under the powers of the Housing, Town Planning, &c., Act, 1909, made a closing order in respect of this house as being unfit for human habitation, and they subsequently refused an application by the respondent to determine the order.

The respondent appealed against this refusal to the appellants, who appointed an inspector to hold a public local inquiry. The inquiry was held and the respondent and his solicitor attended, and evidence was adduced on behalf of the respondent. The inspector, after inspecting the house, submitted his report, together with the shorthand notes of the proceedings, to the appellants.

The appellants, after consideration of the facts and the evidence given at the inquiry and the report of their inspector, confirmed the refusal of the borough council to determine the closing order.

The respondent thereupon obtained from a Divisional Court an order nisi for a writ of certiorari for the purpose of quashing the order of the appellants on the ground that they had not determined the appeal in manner provided by law. The application of the respondent was based upon the grounds (1.) that the appeal was not shown to have been determined by the appellants or by any one lawfully authorized to act for them inasmuch as the order did not disclose by which officer of the Board the appeal had been decided, and (2.) that the respondent was entitled to be heard orally by the appellants. In the argument in the Court of Appeal the respondent relied also on this further ground: (3.) that he was entitled to see the report of the appellants' inspector.

On cause shown, a Divisional Court consisting of Ridley, Coleridge, and Bankes JJ. discharged the order nisi. The Court of Appeal (Vaughan Williams and Buckley L.JJ., Hamilton L.J.

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dissenting) reversed this decision and ordered the writ of certiorari to issue.

1914. June 15, 16, 18. *Sir John Simon, A.-G.*, and *Sir Stanley Buckmaster, S.-G.* (with them *G. A. H. Branson*), for the appellants. Sect. 17 of the Housing, Town Planning, &c., Act, 1909, repeals and replaces ss. 32 and 33 of the Housing of the Working Classes Act, 1890, and introduces a new procedure. Under the earlier Act the only power of the local authority in dealing with insanitary dwelling-houses was to apply to a Court of summary jurisdiction for a closing order, and the owner had a right to appeal to the Court of quarter sessions. Under this Act the local authority may themselves make the closing order and the appeal is to the Local Government Board. The procedure is the same in the case of a refusal to determine the closing order. Sect. 39 empowers the Local Government Board to make rules regulating the procedure on any such appeal and requires that the rules shall provide that the Board shall not dismiss any appeal without having first held a public local inquiry. (1) The substantial question raised by the appeal is whether an owner appealing to the Local Government Board is entitled as of right to see the report made by their inspector on the local inquiry before the appeal is dismissed and to vitiate the proceedings on the appeal by reason of the failure of the Local Government Board to disclose such report. The inquiry referred to in s. 39 is the ordinary local inquiry with which Parliament was familiar. The holding of local inquiries by the Local Government Board is directed by many statutes, and it has always been the practice of the Board to treat the reports of their inspectors on such inquiries as confidential documents for their own use: *Attorney-General* v. *Nottingham Corporation*. (2) This Act contains nothing to alter that practice. The position of the inspector is analogous to that of nautical assessors in an admiralty action, and in that case it is settled that the parties are not

(1) Sects. 17 and 39 of the Housing, Town Planning, &c., Act, 1909, and the Rules made by the Local Government Board under the latter section are set out in [1914] 1 K. B. at pp. 204—206.

(2) (1904) 2 L. G. R. 698, at p. 701.

at liberty to see the report of the nautical assessors, though it happens to be in writing: *The Banshee.* (1) So in the case of criminal appeals the judge who has tried the case frequently makes a report to the Court of Criminal Appeal, but the parties are not allowed to see it. The Local Government Board have followed the procedure prescribed by the Act and there is no ground for saying that they have not determined the appeal in manner provided by the law. They must, of course, act in a judicial spirit, but they are not bound to adopt the procedure of a Court of law: *Board of Education* v. *Rice* (2); *Rex* (*Cairns*) v. *Local Government Board* (3); *School Board of Parish of Dalziel* v. *Scottish Education Department.* (4)

Macmorran, K.C., and *Upjohn, K.C.* (with them *Brooke Little*), for the respondent. 1. The decision upon the appeal to the Local Government Board is not the act of the Board, because it was not made in the manner prescribed by s. 5 of the Local Government Board Act, 1871. The parties have a right to know who is the officer who decided the appeal.

2. The respondent was entitled to present his case orally in the presence of the other side to the officer who actually decided the appeal and to hear the other side present their case orally in his presence. The inspector holding the public inquiry was not the person who decided the appeal, and the respondent was entitled to be heard on the appeal itself. The local inquiry was merely a step in the appeal. The Act of 1909 is a penal statute, and one would expect a priori that a person whose house was to be demolished would have a right to be heard before the officer who had to determine whether the demolition order should be affirmed. The Act did no more than effect a transfer of jurisdiction to be exercised on the old lines. The intention of the Legislature was to create a new procedure of a judicial character. It follows that the Board must act judicially, that is to say, not merely in a judicial temper, but substantially as a judge between litigant parties, and must give the parties an opportunity of being heard in person before the deciding officer: *Parsons* v. *Lakenheath School Board* (5);

(1) (1887) 56 L. T. 725.
(2) [1911] A. C. 179, at p. 182.
(3) [1911] 2 I. R. 331.
(4) (1913) 1 S. L. T. 457.
(5) (1889) 58 L. J. (Q.B.) 371.

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Spackman v. *Plumstead Board of Works.* (1) The word "appeal" has never been used before in respect of an application to the Local Government Board except in cases where the subject has been given an alternative remedy to go to the ordinary Courts. "Appeal" connotes a right to be heard. Sect. 53, sub-s. 14, whereby ss. 17 and 39 are applied to Scotland, substitutes the sheriff, who is primarily a judicial officer, for the Local Government Board. This sub-section, which provides for a judicial inquiry in the ordinary sense, throws some light upon the meaning of "appeal" as used in this statute, the objects of which are common to both countries; and if upon a fair construction of s. 39 it is possible to hold that the appeal is to be determined judicially, in the proper sense of the term, this construction is aided by the procedure in Scotland. Sect. 39 empowers the Local Government Board to make rules of procedure and it contemplates a regulated procedure and a regulated hearing. The provision in the section as to stating a special case implies that there must be a hearing, for otherwise an appellant to the Board cannot say whether he wants a case stated or not. There is nothing in the section or in the rules made thereunder which is inconsistent with the right of an appellant to be heard before the deciding officer, and the burden is on those who deny the right to appear which an appellant had under the previous statute to show that it has been taken away.

3. The respondent was entitled to see the report of the inspector upon which the decision of the Board was founded. It is contrary to natural justice that the official who decides the appeal should determine it against the owner upon a consideration of material documents which were not communicated or disclosed to him, and without giving him an opportunity of being heard upon them. The Act requires no such construction, and if an Act of Parliament can be construed in a way which will avoid even the appearance of injustice that interpretation ought to be adopted. The word "public" as applied to these local inquiries is new and implies that the reports of the inspector upon such inquiry should be made public. If the Board choose to depute to an officer who is not the deciding officer the holding

(1) (1885) 10 App. Cas. 229, at p. 240.

of the inquiry the position of that officer is analogous to that of an official referee to whom a case has been sent for inquiry and report, and in that case both parties have an opportunity of seeing the report: Rules of the Supreme Court, Order xxxvi., rr. 53, 54, and 55. There is no analogy between the position of the inspector and that of a nautical assessor: see *The Koning Willem II.* (1) The authorities relied upon by Hamilton L.J. are upon different statutes framed in different language and have no application. [They also referred to *Reg.* v. *Justices of Surrey* (2) as to the right of the respondent to a writ of certiorari.]

Sir Stanley Buckmaster, S.-G., in reply. As to the use of the word "appeal," in the Public Health Act, 1875, s. 268, which is the first of a group of sections headed "Appeal," an appeal is provided in certain cases to the Local Government Board, but it has never been the practice in such cases for the appellant to be heard in person before the Board. As to the expression "public local inquiry," the word "public" was inserted to remove a doubt whether the public had a right to be present at these inquiries and does not involve publication of the result of the inquiry. As the statute and the rules there under prescribe only the holding of a public inquiry as an essential condition if the decision of the appeal is against the owner, that impliedly excludes the notion that there is to be a further hearing before the Board. The provision as to stating a special case affords no objection to the contentions of the Board. It would be open to the owner to apply for a case at the local inquiry, e.g., on the ground that the house was not a dwelling-house. As regards the application of the Act to Scotland, under the earlier legislation the sheriff was substituted for the justices and for the Court of quarter sessions, and the effect of the present Act is practically to preserve intact the earlier procedure in Scotland.

The House took time for consideration.

July 20. VISCOUNT HALDANE L.C. (3) My Lords, the question which has to be decided in this case is whether the appellants, the

(1) [1908] P. 125, at p. 137. (2) (1870) L. R. 5 Q. B. 466.
(3) Read by Lord Dunedin.

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Local Government Board, have validly dealt with an appeal brought before them under the provisions of s. 17 of the Housing and Town Planning Act, 1909. The respondent is the assignee of a lease of a dwelling-house, No. 83, Palmerston Road, in the metropolitan borough of Hampstead. On January 12, 1911, the borough council made an order under s. 17, sub-s. 2, of the Act to which I have referred, prohibiting the use of the house for habitation until in their judgment it had been rendered fit for that purpose. On March 7, 1911, the respondent gave notice of appeal to the Local Government Board. That Board intimated, in accordance with s. 39 of the Act and with the rules which it had made thereunder, that it would not decide the appeal without having held a local inquiry. A public inquiry was, as the result, held on May 24, 1911, before Mr. Edward Leonard, one of the housing inspectors of the Board designated for that purpose, who also made a personal inspection of the house on June 2 following. The respondent had furnished the Board with copies of reports of certain experts whom he had consulted, such reports being to the effect that the house was perfectly habitable, and that there was no justification for the closing order. The respondent had intimated that he should decline to attend the inquiry, and he did not appear or tender evidence. On June 6 the inspector submitted to the Board his report of the inspection, and on July 29, 1911, the Board, after considering the report and the other documents before them, confirmed the closing order. On August 11 the respondent applied to the Board to state a special case under s. 39, sub-s. 1 (*a*), of the Act for the opinion of the High Court, raising the point that the order of July 29 was invalid, because (*a*) the report of the inspector had been treated as a confidential document and had not been disclosed to the respondent, and (*b*) because the Board had declined to give the respondent an opportunity of being heard orally by the person or persons by whom the appeal was finally decided, in addition to the opportunity which he had had of stating and arguing his case before the inspector. The Board declined to state a case, and the respondent did not, as he could have done under the Act, apply to the High Court for an order calling on the Board to state it.

My Lords, in the meantime the respondent applied to the borough council to determine the closing order having regard to repairs which he had effected, and on October 5, 1911, the council refused on the ground that the premises had not been rendered by such repairs fit for habitation. On October 19 the respondent appealed again to the Board, this time against the refusal to determine the closing order. I pass over certain communications and proceedings relating to the technical points taken by the respondent, inasmuch as these have ceased to be of importance, and I come to November 25, 1911. On this date the Board gave notice to the respondent of their intention to hold a second public local inquiry with respect to his appeal against the refusal of the borough council to determine the closing order. The inquiry was held on December 8 before the same inspector. The respondent was present with his solicitor and witnesses, and the borough council and the London County Council were also represented. The respondent's solicitor argued his case, and the respondent and his witnesses gave evidence. On December 13 the inspector submitted to the Board his report, together with a shorthand note of the evidence and speeches. On January 8, 1912, the Board intimated to the respondent that it would be willing to consider any further statement in writing which he desired to submit to it. The respondent did not avail himself of this opportunity, but applied for writ of certiorari to remove the order of the Board into the King's Bench Division to be quashed, on the ground that the appeal had not been determined in the manner provided by the law. The points taken were that the appeal had been decided neither by the Board nor by any one lawfully authorized to act for them, and that the procedure adopted by the Board was contrary to natural justice in that the respondent had not been afforded an opportunity of being heard orally before the Board. I assume further, what appears to have been the case, that the point was also taken that the report of the inspector on the second inquiry was not disclosed to the respondent. This point was certainly afterwards argued in the Court of Appeal.

The case was heard before Ridley, Coleridge, and Bankes JJ. Among the affidavits which they had before them was one y

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Sir Horace Monro, the Permanent Secretary of the Board, who stated that the decision was come to after full and careful consideration of the reports made by the inspector, and of the evidence and documents, including the observations and objections put forward in the correspondence by the respondent's solicitors. He referred to the invitation already mentioned, addressed by the Board to the respondent's solicitors, to place before it in writing any further statement the respondent might desire it to consider. He said that the appeal had been determined judicially on the report of the inspector, and the evidence taken by him, (although without any oral hearing of the respondent beyond that of the inquiry) in the same manner in all respects as it had been customary as regards other appeals to the Board. He referred to a formal order of the Board, signed by the President, and by the assistant secretary, dismissing the appeal.

On these facts the learned judges of the King's Bench Division declined to hold that the appeal had not been properly disposed of, both in form and in substance. They considered that the statute and the rules made under it, to which I will presently refer, provided for a public local inquiry at which any party interested might appear and state his case orally, and that it was not intended that there should be a subsequent hearing before the Board analogous to that before a Court of law. They thought that there was nothing contrary to natural justice in such procedure.

The Court of Appeal, consisting of Vaughan Williams, Buckley, and Hamilton L.JJ., by a majority took a different view and reversed the decision. Vaughan Williams L.J. held that the appeal was one inter partes, the respondent and the Hampstead Local Board being the opposing parties. He thought that the duty of the Board was to hear both sides, and to disclose all the evidence of fact placed before them, and the conclusions of law adopted by them as the basis of their decision. He held that the non-production to the respondent of the inspector's reports was contrary to the principles of natural justice, and that, in the absence of a plain direction in the statute abrogating the necessity of observing these principles in dealing with the reports, the

principles of English justice had been violated. He appeared further to think that the absence of any statement by or on behalf of the Board as to which of its members considered the appeal was a further objection to the validity of the Board's order.

Buckley L.J. thought the importance of the general question which was raised very great. It was increasingly common for statutes to empower Government departments to decide questions affecting rights of property, and it was of the first importance that their proceedings should be so conducted as to command the confidence of the public, and that the principles applicable in their conduct should be well understood. A mere power to make rules determining the procedure in such appeals did not obviate the necessity of such rules being in accordance with natural justice. It was essential that each of the parties should know the case the other made and should be heard in the other's presence. Assuming that it could be validly provided that the original hearing should assume the form of a statement in writing, it was not clear that a party who subsequently desired to be heard orally could be debarred from claiming to be so heard.

The learned Lord Justice thought that as the local authority was the authority against which the appeal to the Board was brought, it was in one sense not a party litigant, but, as it could be ordered to make a counter-statement and to pay or receive costs, for all material purposes it was not to be distinguished from a party litigant, and therefore the other party ought to know the case it made. Having regard to the terms of s. 5 of 34 & 35 Vict. c. 70, which constituted the Board and provided that anything to be done on its behalf might be done by the President or any member, or by a secretary or assistant secretary authorized by its General Order, the inspector was not within the class of persons who could decide anything. If he made a report on a public inquiry held by him it should be made public. A case could not be argued before one man and decided by another. The respondent had therefore no real opportunity of presenting his case when he was invited by the letter of January 8, 1912, to do so, for he was not permitted to see the report.

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Hamilton L.J. was of a different opinion. The practice, he said, of the Board, like that of its predecessor the Poor Law Board, had always been to dispose by correspondence of appeals even in important matters such as an auditor's disallowance of items, and in treating the inspector's report as confidential it was only following an old and well-known practice. The question was whether, if the statute itself did not in terms authorize the practice, it was contrary to natural justice, "an expression sadly lacking in precision." He referred to several precedents, and came to the conclusion that it was a sound inference, to be drawn as matter of construction, that the Legislature, aware, as he took it to have been, of the practice as to these inquiries and its incidents, intended that the local inquiry which it prescribed should be the usual local inquiry, and that the usual incidents should attach in default of any special enactment, including the incident that the Board should treat the report as confidential. He was of opinion that what had been done was in accordance with the Act of 1909.

My Lords, I have thought it important to set out with some fulness the conflicting views in the Court of Appeal. It is obvious that two of the judges there based their conclusions on the principle that in the absence of a direction to the contrary, which they could not find in the statute, the analogy of the procedure in a Court of justice must guide them. Hamilton L.J., on the contrary, thought that he found in the statute a scheme of procedure that excluded this analogy. Which of these opinions was right can only be determined by referring to the language of the Legislature. Here, as in other cases, we have simply to construe that language and to abstain from guessing at what Parliament had in its mind, excepting so far as the language enables us to do so. There is no doubt that the question is one affecting property and the liberty of a man to do what he chooses with what is his own. Such rights are not to be affected unless Parliament has said so. But Parliament, in what it considers higher interests than those of the individual, has so often interfered with such rights on other occasions, that it is dangerous for judges to lay much stress on what a hundred years ago would have been a presumption considerably

stronger than it is to-day. I therefore turn to the Acts of Parliament which are relevant with the sense that there is little justification for looking in advance for the embodiment of one scheme as more probable than the embodiment of another.

The closing of dwelling-houses as being dangerous or injurious to health, or unfit for habitation, is no new jurisdiction. The Housing of the Working Classes Act, 1890, gave to the local authority the power to take proceedings to enforce penalties and closing orders before Courts of summary jurisdiction, to be followed, in certain circumstances, by demolition orders. Under that Act the owner of the house had an appeal to quarter sessions. This power of closing was somewhat extended by the Housing of the Working Classes Act, 1903, but the principle of the application being to a Court of justice remained the same. A change of this principle was introduced in the Housing and Town Planning Act, 1909. The local authority was empowered itself to make the closing order, certain conditions having been complied with, and it was given power to determine the closing order if satisfied that the house in respect of which the order had been made had subsequently been rendered fit for habitation. In respect of both a closing order and a determining order the owner was given a right of appeal. But the appeal was to be, not as before to quarter sessions, but to the Local Government Board. Stringent powers of inspection were given to both the local authority and the Local Government Board. In the case of an appeal, the procedure as to everything, including costs, was to be such as the Board might by rules determine. The Board was to have power to make such order on any appeal as it should think equitable. It could state a case, but only on a question of law, for the opinion of the High Court, and could be compelled by the High Court to do so. The rules were to provide that the Board should not dismiss any appeal without having first held a public local inquiry. In the application of the Act to Scotland, the sheriff was to be substituted for the Local Government Board. This provision, however, although relied on in the argument before us, throws but little light on the question as to the character of the jurisdiction created by the Act, for, as is matter of common knowledge, the sheriff in

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Scotland is an administrative as well as a judicial officer, and the Local Government Board in Scotland is, on the other hand, only one of the subordinate departments under the Secretary for Scotland.

My Lords, it is obvious that the Act of 1909 introduced a change of policy. The jurisdiction, both as regards original applications and as regards appeals, was in England transferred from Courts of justice to the local authority and the Local Government Board, both of them administrative bodies, and it is necessary to consider what consequences this change of policy imported.

My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently. I agree with the view expressed in an analogous case by my noble and learned friend Lord Loreburn. In *Board*

of Education v. *Rice* (1) he laid down that, in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on every one who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. The Board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. If the Board failed in this duty, its order might be the subject of certiorari and it must itself be the subject of mandamus.

My Lords, I concur in this view of the position of an administrative body to which the decision of a question in dispute between parties has been entrusted. The result of its inquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached by its ordinary procedure. In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a judge in a Court he is not only at liberty but is compelled to rely on the assistance of his staff. When, therefore, the Board is directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it. This point is not, in my opinion touched by s. 5 of 33 & 34 Vict. c. 70, the Act constituting the Local Government Board to which I have already referred. Provided the work is done judicially and fairly in the sense

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indicated by Lord Loreburn, the only authority that can review what has been done is the Parliament to which the Minister in charge is responsible. The practice of the department in the present case was, I think, sufficiently shown by Sir Horace Monro's affidavit to have been followed. In accordance with that practice the Board, in order to obtain materials with which to decide, appointed one of its health inspectors to hold a public inquiry. This was in accordance with the rules it had made under the section of the statute which I have quoted and with its usual practice. It is said that the report of the inspector should have been disclosed. It might or might not have been useful to disclose this report, but I do not think that the Board was bound to do so, any more than it would have been bound to disclose all the minutes made on the papers in the office before a decision was come to. It is plain from Sir Horace Monro's affidavit that the order made was the order of the Board, and so long as the Board followed a procedure which was usual, and not calculated to violate the tests to which I have already referred, I think that the Board was discharging the duty imposed on it in the fashion Parliament must be taken to have contemplated when it deliberately transferred the jurisdiction, first, from a Court of summary jurisdiction to the local authority, and then, for the purposes of all appeals, from quarter sessions to an administrative department of the State. What appears to me to have been the fallacy of the judgment of the majority in the Court of Appeal is that it begs the question at the beginning by setting up the test of the procedure of a Court of justice, instead of the other standard which was laid down for such cases in *Board of Education* v. *Rice*. (1) I do not think the Board was bound to hear the respondent orally, provided it gave him the opportunities he actually had. Moreover, I doubt whether it is correct to speak of the case as a lis inter partes. The Hampstead Borough Council was itself acting administratively, although it had the right to appear, and did appear, before the inspector and on the appeal, and might have to pay or receive costs.

For the reasons I have given, I have arrived at the conclusion

(1) [1911] A. C. 179.

that the judgments of the Divisional Court and of Hamilton L.J. in the Court of Appeal were right, and that this appeal should be allowed with costs here and in the Court of Appeal, and that the order of the Divisional Court should be restored.

LORD SHAW OF DUNFERMLINE. (1) My Lords, my noble friend Lord Sumner, then Hamilton L.J., delivered an opinion in the Court of Appeal in this case which in all but one particular to which I shall refer so exactly expresses my own judgment, that I feel loth to add any words of my own. But the action has been represented to be one of such importance, that I feel called upon, however reluctantly, to state separately my view.

There are really only these points: (1.) As to the form of the pronouncement of the Local Government Board. It is said that the respondent as the lessee of a house declared to be insanitary is entitled to get behind that pronouncement and to ascertain which, in this great department of State, were the actual mind or minds which judged his case. I state this simpliciter in order to test it.

In my opinion this demand is unjustifiable. It is not supported by statute, it would be inconsistent with past administrative practice, and it would not tend to, but might seriously impair, administrative efficiency.

By s. 5 of the Local Government Board Act, 1871, provision is made as to the seal, style, and acts of the Board. The Board itself is composed of several men of eminence. It is provided by s. 3 that it may appoint secretaries, assistant secretaries, inspectors, and others such as may be determined by it with the sanction of the Treasury. And as to its seal, style, and acts "a rule, order, or regulation made by the Local Government Board shall be valid if it is made under the seal of the Board and signed by the President or one of the ex officio members of the Board, and countersigned by a secretary or assistant secretary." It is provided that the production of such prima facie evidence shall, "until the contrary is shown, be a sufficient proof that any such rule, order, or regulation of the Local Government Board was duly made."

(1) Read by Lord Atkinson.

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It is admitted that in form the decision of the Local Government Board upon the appeal against the decision of the Hampstead Borough Council is according to statute. This is so both as regards the confirmation, on July 29, 1911, of the closing order, and also as regards the confirmation of February 26, 1912, of the refusal of the local authority to determine the closing order. In each case the decision is under seal, and is signed by Mr. John Burns, President of the Board, and by an assistant secretary.

But it is said that the respondent is entitled to know his particular judge or judges, to individualize the Board, and to demand that that person or those persons so discovered shall give him, the respondent, an audience on the whole material available, including the result of the public local inquiry and the report made thereupon by the Board's inspector. In the first place, of the demand to know the individual judge or judges. My Lords, how can the judiciary be blind to the well-known facts applicable not only to the constitution but to the working of such branches of the Executive? The department is represented in Parliament by its responsible head. On the one hand he manages its affairs with such assistance as the Treasury sanctions, and on the other he becomes answerable in Parliament for every departmental act. His Board—that is, all the members of it together—may never meet, or they may only be convened on some question of policy; but a determination, signed and sealed and issued in correct form, stands as the deliverance of the Board as such, for which determination the President becomes answerable to Parliament. This is the general rule, acknowledged and familiar, of departmental action and responsibility.

With regard to the making of this rule, however, and on the assumption that the grotesque demand to individualize the department for private purposes is put on one side, the next proposition is this, that when a public local inquiry has been held in compliance with statute, the person whose interests are affected is entitled to something more, namely, a disclosure of the views of the inspector written out by him, in jottings or otherwise, for the guidance or consideration of the department in dealing with the case.

My Lords, it is here (and the matter is not a strictly legal one) that I venture to hold an opinion somewhat different from that of Lord Sumner. I incline to hold that the disadvantage in very many cases would exceed the advantage of such disclosure. And I feel certain that if it were laid down in Courts of law that such disclosure could be compelled, a serious impediment might be placed upon that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks. The very same argument would lead to the disclosure of the whole file. It may contain, and frequently does contain, the views of inspectors, secretaries, assistants, and consultants of various degrees of experience, many of whose opinions may differ but all of which form the material for the ultimate decision. To set up any rule that that decision must on demand, and as matter of right, be accompanied by a disclosure of what went before, so that it may be weakened or strengthened or judged thereby, would be inconsistent, as I say, with efficiency, with practice, and with the true theory of complete parliamentary responsibility for departmental action. This is, in my opinion, implied as the legitimate and proper consequence of any department being vested by statute with authority to make determinations.

This conclusion is in no way changed by the circumstance of the determinations being, in point of fact, upon appeal from the deliverances of another or inferior authority. The judgments of the majority of the Court below appear to me, if I may say so with respect, to be dominated by the idea that the analogy of judicial methods or procedure should apply to departmental action. Judicial methods may, in many points of administration, be entirely unsuitable, and produce delays, expense, and public and private injury. The department must obey the statute. For instance, in the present case it must hold a public local inquiry, and upon a point of law it must have a decision of the Law Courts. Quoad ultra it is, and, if administration is to be beneficial and effective, it must be the master of its own procedure. For it must always be borne in mind that its procedure if not in defiance of elementary standards—say, by hearing one side and refusing to hear the

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other—is simply the plan which it adopts to satisfy itself that the decision come to by a local authority was a good or a bad decision.

These views may be illustrated by the demand in the present case. The respondent admits that a public local inquiry was held; but he asks (1.) to see as of right what report was made to the department upon it, and (2.) to be heard thereafter over again on the whole case. I think neither demand to be justified. And with regard to the latter I would add that the very fact that the Act expressly imposes publicity upon the local inquiry—for reasons, in cases of sanitation and the public interest therein, not far to seek—by implication negatives anything of the kind in regard to the numerous other steps taken in the working of an administrative department. I entirely agree with Lord Sumner in his view on this head.

The words "natural justice" occur in arguments and sometimes in judicial pronouncements in such cases. My Lords, when a central administrative board deals with an appeal from a local authority it must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term "natural justice" means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old jus naturale it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous.

I have looked through these proceedings more than once, and I cannot see from beginning to end of them that the Local

Government Board did not act justly to the respondent or to the case. They showed extreme patience, and they handled the case with scrupulous regard to their statutory duties and to the rights of all concerned.

I concur in the opinion of the Lord Chancellor.

LORD PARMOOR. My Lords, the appellants on February 26, 1912, issued an order under seal, signed by the President and countersigned by an assistant secretary, confirming the refusal of the Hampstead Borough Council to determine a closing order, which prohibited the use of the dwelling-house known as 83, Palmerston Road, in the said borough, for human habitation.

The respondent is assignee of a lease of the said house for a term of years, of which at the date of the closing order more than fifty years were unexpired. The respondent obtained a rule nisi in the High Court of Justice, calling upon the Local Government Board to show cause why a writ of certiorari should not be issued, directed to the said Board, to remove into Court the said order of February 26, 1912, on the ground that the Local Government Board had not determined the appeal against such refusal in manner determined by law. This rule was discharged on argument, but the decision of the Divisional Court was overruled in the Court of Appeal, and it is against this decision that the appeal is brought to this House.

By the Housing and Town Planning, &c., Act, 1909, a new procedure was introduced in connection with the closing of houses so dangerous or injurious to health as to be unfit for human habitation. A duty was placed on the local authority to make a closing order, if, on the representation of the medical officer of health, or of any other officer of the authority, or on any other information given, any dwelling-house appeared to them to be so dangerous or injurious to health as to be unfit for human habitation. A closing order in the present case was made by the local authority and an appeal against such order was dismissed by the Local Government Board. There is a further provision that the local authority shall determine any

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closing order made by them, if they are satisfied that the dwelling-house in respect of which the order has been made has been rendered fit for human habitation. An application to determine the closing order was refused by the local authority, and the order of February 26, 1912, confirmed this refusal on appeal.

The procedure to be followed when an appeal is brought to the Local Government Board is regulated in and defined by the Act. In the first place, the Local Government Board is directed to make rules. Such rules were duly made on January 11, 1910, and were followed in the present instance. In the second place, it is provided that the Local Government Board may at any stage of the proceedings on appeal and shall, if so directed by the High Court, state, in the form of a special case for the opinion of the Court, any question of law arising in the course of the appeal. Thirdly, it is provided that the Local Government Board shall not dismiss any appeal without having first held a public local inquiry.

My Lords, no point was raised whether the case was one to which procedure by writ of certiorari was appropriate, and it is not necessary to attempt to define the exact ambit within which such procedure can be properly applied.

The power of obtaining a writ of certiorari is not limited to judicial acts or orders in a strict sense, that is to say, acts or orders of a Court of law sitting in a judicial capacity. It extends to the acts and orders of a competent authority which has power to impose a liability or to give a decision which determines the rights or property of the affected parties. Where, however, the question of the propriety of procedure is raised in a hearing before some tribunal other than a Court of law there is no obligation to adopt the regular forms of legal procedure. It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice.

In determining whether the principles of substantial justice have been complied with in matters of procedure, regard must necessarily be had to the nature of the issue to be determined and the constitution of the tribunal. The general tests to be applied have been expressed in two cases which have come before

this House, *Spackman* v. *Plumstead Board of Works* (1) and *Board of Education* v. *Rice*. (2) In the earlier case of *Spackman* v. *Plumstead Board of Works* (1) the question raised was whether the certificate of the superintending architect was conclusive in fixing the general line of building under the Metropolis Management Act, 1862. Lord Selborne, in the course of his opinion, states: "No doubt in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their views." In the present case there are special provisions for procedure, and the Local Government Board have, in my opinion, given the parties a fair opportunity of being heard before them and stating their case and views.

In the later case of *Board of Education* v. *Rice* (2) it was held that the Board of Education had not determined the questions submitted to them. It was on this ground that the order of the Board was quashed and a mandamus was issued commanding the Board to determine the real questions submitted for determination. In expressing his opinion to the House the Lord Chancellor stated his views on the propriety of procedure: "In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon any one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." Applying this test to the present case, the Local Government Board have given to the respondent a full opportunity to state his case before them, and the respondent had the further right under the statute to a public hearing at the local inquiry and to

(1) 10 App. Cas. 229. (2) [1911] A. C. 179.

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bring before the High Court any question of law which might emerge at any stage of the appeal. Whether the order of the Local Government Board is to be regarded as of an administrative or of a quasi-judicial character appears to me not to be of much importance, since, if the order is one which affects the rights and property of the respondent, the respondent is entitled to have the matter determined in a judicial spirit, in accordance with the principles of substantial justice.

My Lords, the objections raised in the present case range themselves under three heads.

The first objection raised by the respondent to the order of the Local Government Board is that there has been no hearing or determination at all before the Local Government Board, and that the order complained of has not been made by the statutory tribunal. If such a contention could be established I agree that a writ of certiorari should issue. I find some difficulty in appreciating the argument on which this contention is founded. In substance the respondent claims that his appeal should be heard before some definitely specified person or persons, and says that, unless this is done, the whole matter is coram non judice. In my opinion such a claim is inconsistent with the ordinary system of procedure when the determining authority is a large administrative department. I can find nothing in the statute to indicate that in appeals to the Local Government Board against an order of the local authority, or a refusal to make an order under the Act of 1909, a specialized system of procedure should be adopted. In support of this argument reliance was placed on paragraphs 20, 21, 22 of the affidavit of Sir Horace Monro. These paragraphs state that after careful and impartial consideration of the facts and evidence given at the public local inquiry, and affording the respondent an opportunity of making any further statement, the appeal was determined in all respects as appeals have been accustomed to be determined, and that the order was made under the seal of the Board signed by the President and countersigned by an assistant secretary. So far from these paragraphs supporting the claim of the respondent they appear to me to negative conclusively his objection that there was no hearing or determination of the appeal by the Local Government Board. I desire to

add that I can see no ground for criticizing the form in which the affidavit of Sir Horace Monro has been made.

The second objection raised is that the respondent was entitled to see the report of the inspector, and that to withhold this document, deprived him of a fair hearing in accord with the principles of substantial justice. The only word in the statute on which a claim to see the report can be based is the word "public" prefixed to "local inquiry." This word is said to have been used for the first time in the 1909 Act. In my opinion a public local inquiry means no more than that an inquiry should be held in the locality and be open to the public. It was well known in 1909 that the Local Government Board did not in ordinary cases publish the reports of inspectors before whom local inquiries were held. Unless an opposite intention is declared, or can be inferred, a statutory form of procedure should be construed so as to conform with prevailing practice. It was argued that there was a particular reason why in this instance the report should be published since its non-disclosure would be an interference with the right to obtain a special case for the opinion of the Court on any question of law arising in the course of an appeal. It is just possible that the non-disclosure of the terms of the report might make it more difficult in some particular instance to formulate a claim for a special case, but in substance the materials on which to base a right to such a case would be independent of the inspector's report, and the view of the inspector on a matter of law would not be material.

The present case is a good illustration. If the respondent was desirous of raising, as a matter of law, any question as to the constitution of the tribunal, the non-disclosure of the report, or the right to give oral testimony, all the material to raise any of these questions was open to him quite apart from any information to be obtained from an inspection of the inspector's report. Any opinion expressed by the inspector on such matters could in no way have altered the legal obligation. It is true that there is no statutory prohibition against the publishing of the inspector's report. If I thought that this non-disclosure deprived the respondent of a fair hearing in accord with the terms of

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substantial justice, I should accede to the argument on behalf of the respondent, and should hold the same view whether the appeal is to be regarded as a quasi-judicial act or as a decision on review of the administrative action of the local authority. I am unable, however, to come to any such conclusion, and doubt whether assistance is to be gained from arguments based on analogous cases. The analogy of an official referee, referred to by Mr. Upjohn in argument, appears to me to have as much weight as the analogies on the other side referred to by the Attorney-General. If the report of the inspector could be regarded as in the nature of evidence tendered either by the local authority or the owner of the premises, there would be a strong reason for publicity. In my opinion it is nothing of the kind, and is simply a step in the statutory procedure for enabling an administrative body, such as the Local Government Board, to hear effectively an appeal against the order of the local authority. The obligation on the Local Government Board to hold a public inquiry in the locality is to enable the facts on either side to be ascertained by oral testimony subjected to the test of cross-examination, if either party should so require, and to ensure in this respect a full opportunity to the appellant to be heard before dismissing his appeal against the decision of the local authority.

The third objection raised is that the respondent was entitled to give oral testimony before the determining tribunal in addition to any oral testimony which might be given at the public local inquiry, and that in the denial of his claim to be so heard his appeal has not been determined in accordance with the principles of substantial justice. The provisions of the statute are not inconsistent with the right to give oral testimony, and if in any particular instance the Local Government Board are of opinion that such evidence might help in the determination of an appeal it is within their competency to hear it. I can, however, find no obligation to admit such oral testimony in all cases, and there is a strong inference against the claim in the provision that an appeal shall not be dismissed without first holding a public local inquiry, at which there is full opportunity to give oral testimony. The rules made by the Local Government Board are not framed

to allow oral testimony in an ordinary case, and it is extravagant to suggest that these rules are ultra vires having regard to the statutory powers under which they are made. Can it be said that in a case in which the statute gives the right to a public local inquiry, and in which the statutory rules of procedure do not provide for oral testimony before the Local Government Board, the mere refusal to hear such oral testimony amounts to a denial of the principles of substantial justice? I am unable to come to any such conclusion. It appears to me that in the present case the respondent had every fair opportunity of bringing his case before the determining tribunal, and that he has no substantial ground for complaint.

My Lords, in my opinion the appeal should be allowed with costs here and below.

LORD MOULTON. (1) My Lords, in the year 1890 an Act was passed dealing with the housing of the working classes, which forms the basis of the legislation to which this litigation relates. Its title is the Housing of the Working Classes Act, 1890, and it will be referred to herein as the principal Act. The scheme for dealing with unhealthy dwelling-houses in that Act rested normally upon the initiative of the local authority on the information of their medical officer of health, but very small executive powers were given by that Act to the local authority in respect of enforcing their views as to a house being unfit to be used as a human dwelling-house. All that they were empowered to do was to apply to a justice of the peace for a summons to the owner and occupier of the house and to initiate proceedings by that summons before justices of the peace under the provisions of various Sanitary and Nuisance Acts. Power was given to justices before whom such proceedings were taken to prohibit the using of the dwelling-house until it had been rendered fit for habitation to their satisfaction. The usual appeal to quarter sessions against any order so made by the justices existed.

This enactment underwent various amendments between the years 1890 and 1909, the details of which are not necessary for the purposes of this judgment. But in the year 1909 a new Act

(1) Read by Lord Dunedin.

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was passed, entitled the Housing, Town Planning, &c., Act, 1909, which amended the principal Act and those that had followed it in various matters of prime importance. That which concerns the present case is the procedure for closing orders which it introduced. This procedure differs widely from the procedure for the like purpose under the previous Acts. It gave to the local authority the power to make orders prohibiting the use of a dwelling-house for human habitation until in the judgment of the local authority it was rendered fit for that purpose in all cases in which it appeared to them to be unfit for human habitation, and indeed it imposed upon them the duty to make such an order if, on the representation of their medical officer of health or any other of their officers or on other information given, the dwelling-house appeared to them to be in the above state. It directed that notice of such a closing order, when made, should be forthwith served on every owner of the dwelling-house in respect of which it was made, and any owner aggrieved thereby was given an appeal against the order to the Local Government Board. The local authority was empowered to determine any such closing order if it was satisfied that the necessity for it no longer existed, and if on application by any owner of the dwelling-house to terminate the closing order they refused so to do, that owner had a right to appeal to the Local Government Board against such refusal.

To my mind the above changes go far beyond mere changes in procedure. Under the new provisions the closing order became an executive act within the powers of the local authority in cases where in their opinion the circumstances justified its being made. It was no longer obliged to seek the authorization of the magistrates subject to an appeal to quarter sessions. In like manner the appeal to the Local Government Board was made to take the place of the appeal to quarter sessions. I have no doubt that the new procedure as to appeal was intended to be an appeal to a superior executive body as such, and that it was not intended that the Local Government Board should act in a purely judicial capacity. There is no doubt that it must act "in a judicial temper." Its order might confirm an order of the local authority interfering with the property of a private individual, and there-

upon that order would be capable of legal enforcement. In the exercise of such powers the Local Government Board would be bound to treat the matter in a judicial spirit, availing itself of its wide powers solely for the purpose of carrying into effect in the best way the provisions of the Act. But although in this sense it must act judicially, there was not, in my opinion, any obligation upon it to follow wholly, or in any special respects, the procedure of a Court of justice, provided that the procedure adopted by them was consistent with their performance of their duties judicially in the sense to which I have referred.

The Act is not silent with regard to the procedure to be adopted by the Local Government Board in the discharge of the above functions. By s. 39 of the Act of 1909 it is left to them to determine by rules what this procedure shall be, subject to two restrictions. In the first place, after giving to them the power to state a special case for the opinion of the Court on any point of law arising in the course of the appeal, it is enacted that they shall state such a case if directed so to do by the High Court. In the second place it is enacted that the rules so to be made by the Local Government Board shall provide that the Local Government Board shall not dismiss any such appeal without having first held a public local inquiry.

The wisdom of this last provision is evident. The local authority, who are empowered to make the original closing order, are presumably acquainted with the local conditions and the actual facts as to the dwelling-house in question. But the Local Government Board can originally have no such special knowledge. In order, therefore, fully to protect the individual owner, the Local Government Board, before deciding in an appeal against a closing order, is bound to hold a public local inquiry that it may be able to learn at first hand the facts of the case before deciding that the closing order shall be affirmed. The inquiry is termed a "public local inquiry." Although it appears to be novel to speak of a "public" local inquiry being held by the Local Government Board, yet local inquiries have for many years been held by them in connection with the exercise of other functions of the Board, and such inquiries were commonly held in public. The effect of the insertion of

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the word "public" appears to me to be that every member of the public would have a locus standi to bring before the inquiry any matters relevant thereto so as to ensure that everything bearing on the rights of the owner or occupier of the house affected, or the interests of the public in general, or of the public living in the neighbourhood in particular, would be brought to the knowledge of the Local Government Board for the purpose of enabling it to discharge its duties in connection with the appeal.

Such is the legislation which we have to apply to the facts of the present case. Those facts are very simple. The respondent is an owner of a dwelling-house, No. 83, Palmerston Road, in the metropolitan borough of Hampstead. On January 12, 1911, the mayor, aldermen, and councillors of that borough, who were the "local authority" referred to in the legislation, made an order prohibiting the use of that house for human habitation until, in their judgment, it was rendered fit for that purpose. This "closing order" was in due form and was duly served. An inquiry was duly held by the Local Government Board and the closing order was confirmed, and against that confirmation no appeal has been brought.

On July 10, 1911, the respondent, through his solicitors, applied to the local authority to determine the said closing order on the ground that the necessary and proper repairs had been effected. The local authority did not consider that such was the case, and on October 7, 1911, by an informal notice to the respondent, and on November 2, 1911, by a notice in due and proper form, they informed the respondent that they refused to determine the said closing order. On November 15, 1911, the respondent duly gave notice of appeal against this refusal, and it is out of the proceedings on that appeal that the present litigation arises.

All the formalities required by statute, or by the rules made by the Local Government Board under their statutory powers relating to appeals of the kind in question, were duly carried out. An inspector was sent down to hold a public inquiry. It was held on December 8, 1911. The respondent was represented on that occasion by his solicitor. He was called as a witness on his own behalf, and there is no question that every

opportunity was given to him and to every other member of the public to bring forward any relevant matter at that inquiry. After it had taken place, the inspector, who was an expert in such matters, made a personal examination of the premises in company with persons representing respectively the respondent and the local authority. He made his report to the Local Government Board, and on February 26, 1912, the Local Government Board made an order in the matter confirming the refusal of the local authority to determine the closing order.

On April 18, 1912, the respondent applied to a Divisional Court of the King's Bench Division and obtained a rule nisi, calling on the appellants to show cause why a writ of certiorari should not issue to remove into the King's Bench Division the said order of the Local Government Board of February 26, 1912, in order that it might be quashed on the ground that the Local Government Board had not determined the appeal against such refusal in manner provided by law. I do not wish by this judgment to give any countenance to the view that certiorari is a proceeding applicable to administrative orders made by such a department of State as the Local Government Board under statutory powers such as we have here to deal with, but the point was not argued, and I therefore assume in favour of the respondent that the procedure he adopted was correct. Cause was shown against the rule, and on December 18, 1912, it was discharged, but on appeal to the Court of Appeal the order of the King's Bench Division discharging the rule was reversed by a majority (Hamilton L.J. dissentiente), and it is from this decision of the Court of Appeal that the present appeal is brought.

Shortly stated, the ground on which the majority of the Court of Appeal proceeded was that the procedure adopted by the Local Government Board was contrary to natural justice; firstly, because the appellant had no opportunity of being heard by the member or members of the Local Goverment Board who in fact decided the appeal as to the closing order; and, secondly, because the Local Government Board refused to disclose the report or reports of their inspector who held the public inquiries.

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I confess that I am unable to understand the meaning of the phrase "contrary to natural justice" in connection with such a matter as is involved in the present case. The original closing order and the refusal to determine it were administrative acts which the local authority was authorized to do in the interests of public health. Their authority was purely statutory, and if the statute had authorized them to do these acts without giving any appeal, the legislation might be considered to be unwisely drastic, but it would have to be recognized and enforced by the Courts, and no such question as to whether or not it was "contrary to natural justice" could possibly be considered by the Courts. Such a question would be unmeaning in such a connection. And although the Legislature has not followed such a course in connection with closing orders, it is easy to call to mind many matters in which prompt action is so necessary that provisions as drastic as those I have described might be necessary. Cases of quarantine regulations or the destruction of unwholesome food exposed for sale might under certain circumstances be well left to the decision of executive officers without any appeal being given.

In the present case, however, the Legislature has provided an appeal, but it is an appeal to an administrative department of State and not to a judicial body. It is said, truthfully, that on such an appeal the Local Government Board must act judicially, but this, in my opinion, only means that it must preserve a judicial temper and perform its duties conscientiously, with a proper feeling of responsibility, in view of the fact that its acts affect the property and rights of individuals. Parliament has wisely laid down certain rules to be observed in the performance of its functions in these matters, and those rules must be observed because they are imposed by statute, and for no other reason, and whether they give much or little opportunity for what I may call quasi-litigious procedure depends solely on what Parliament has thought right. These rules are beyond the criticism of the Courts, and it is not their business to add to or take away from them, or even to discuss whether in the opinion of the individual members of the Court they are adequate or not. In the present case they appear to me to be abundantly

sufficient to secure that the Local Government Board shall be fully seised of the facts of the case in which it is called in, and that it can and will get all necessary guidance as to the law. But even if my opinion were the reverse it would only indicate that I disapproved of the legislation. It could not give rise to any question as to the statutory procedure conforming or not conforming to any notions of my own as to "natural justice."

I shall not, therefore, deal specifically with any of the points on which the majority of the Court of Appeal have criticized the procedure of the Local Government Board on abstract grounds, but there is one point which needs notice, namely, the claim that the respondent was entitled as of right to see the report of the inspector who held the public inquiry.

No such right is given by statute or by an established custom of the department. Like every administrative body, the Local Government Board must derive its knowledge from its agents, and I am unable to see any reason why the reports which they make to the department should be made public. It would, in my opinion, cripple the usefulness of these inquiries. It is not for me to express my opinion of the desirability of an administrative department taking any particular course in such matters, but I entirely disassociate myself from the remarks which have been made in this case in favour of a department making reports of this kind public. Such a practice would, in my opinion, be decidedly mischievous.

I am, therefore, of opinion that the Court of King's Bench was right in discharging the rule nisi, and that this appeal should be allowed, and that the respondent should pay the costs of all the proceedings.

Order of the Court of Appeal reversed and order of the King's Bench Division restored. The respondent to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, July 20, 1914.

Solicitors for appellants: *Sharpe, Pritchard & Co.*
Solicitors for respondent: *Rubinstein, Nash & Co.*

[HOUSE OF LORDS.]

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LANCASHIRE AND YORKSHIRE RAILWAY COMPANY . . . . . } Appellants;

AND

THE LORD MAYOR, &c. OF LIVERPOOL . Respondents.

Et e Contra.

Local Government—Rating—Land used as a Railway—Liverpool Corporation Act, 1893 (56 & 57 *Vict. c. clxxxi.*), *s.* 36.

By the Liverpool Corporation Act, 1893, the corporation were empowered to levy a general rate on the net annual value of all property assessed for the time being to the relief of the poor, provided that no person occupying land used only as a railway made under the powers of any Act of Parliament for public conveyance should be rated in respect of the same to the general rate in any greater proportion than one fourth part of the net annual value thereof.

The appellants were the owners and occupiers of two goods stations, both of which were situate at a lower level than their main lines of railway and were connected with the main line by an inclined line of rails. One station was also connected therewith by waggon hoists by which waggons were always raised to the higher level. Besides the hoists, the stations included sidings and turntables, loading platforms or mounds for goods and cattle, loading ways or roads adjacent to the platforms, capstans and cranes, and substantially built sheds enclosing a large area occupied by running lines and loading platforms and ways. The appellants claimed the statutory exemption in respect of the roofs of the sheds and in respect of all the other items:—

Held, that all these items except the roofs were rateable as land used only as a railway, but that in the circumstances the roofs were part of the station buildings as distinguished from the railway.

South Wales Ry. Co. v. *Swansea Local Board* (1854) 4 E. & B. 189 and *London and North Western Ry. Co.* v. *Llandudno Improvement Commissioners* [1897] 1 Q. B. 287 discussed.

Decision of the Court of Appeal [1913] 3 K. B. 247 varied.

Appeal and cross-appeal from an order of the Court of Appeal varying an order of the Divisional Court upon a special

* *Present:* Lord Dunedin, Lord Atkinson, Lord Shaw of Dunfermline, Lord Sumner, and Lord Parmoor.

case stated by the Recorder of Liverpool sitting at quarter sessions. (1)

The Lancashire and Yorkshire Railway Company appealed to the Court of quarter sessions against a general rate levied by the Corporation of Liverpool under s. 34 of the Liverpool Corporation Act, 1893 (56 & 57 Vict. c. clxxxi.), in respect of certain lands, buildings, sheds, offices, stables, sidings, turntables, and other fixtures and erections of which the company were the owners and occupiers, comprising the North Docks Goods Station and the Great Howard Street Goods Station.

By s. 36 of the said Act, "The general rate shall be levied on the net annual value of all property for the time being assessed to the relief of the poor and included in the valuation lists of the different parishes in the city in force at the time of levying the rate with such additions as may be lawfully made under this Act Provided that:—

. . . . . .

"(ii.) No person occupying land used as arable meadow or pasture ground or orchards or allotments only or as woodland market garden or nursery ground or any land covered with water and used only as a dock or a canal or the towing path thereof or as a railway made under the powers of any Act of Parliament for public conveyance shall be rated in respect of the same to the general rate in any greater proportion than one-fourth part of the net annual value thereof."

The company in respect of certain parts of the said premises claimed the exemption conferred by this proviso.

The lines of rails coloured blue in the plans Nos. 1 and 2 hereinafter referred to were rated as part of the directly productive running lines of the company's railway in the parish of Liverpool and were not included in the assessment which was the subject of this appeal.

The facts found by the recorder with regard to each station were separately stated in the special case.

The North Docks Goods Station was delineated upon an agreed plan contained in the appendix and marked plan No. 1.

By agreement between the parties the land, buildings, and

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other erections and fixtures comprising the station were divided into the different parts enumerated in the following schedule.

SCHEDULE A.

Description.	Colour on Plan.	Net Annual Value.
1. The roof over lines directly productive .	Hatched red .	£357
2. The roof over loading platforms and mounds	Hatched red .	190
3. The roof over loading ways or roads . .	Hatched red .	320
4. The loading ways or roads and the land thereunder	Brown . .	654
5. The loading platforms or mounds and the land thereunder	Yellow . .	399
6. Cattle loading platforms or mounds and the land thereunder	Yellow . .	162
7. Sidings and turntables and the land thereunder	Sepia . .	789
8. Hoist houses and land thereunder, hoists, capstans and their machinery, and cranes	Hatched blue	51
9. Approach roads to loading ways or roads and the land thereunder . . .	Purple . .	437
10. Buildings and land thereunder and premises other than above	Uncoloured .	4285
Total rateable value . . .		£7644

The company claimed the statutory exemption in respect of items 1 to 9. The corporation conceded the exemption in respect of item 7.

The various items are fully described in the special case which is set out in the previous report of this case.

For the purposes of this appeal the following description is sufficient. This station was situated between Regent Road and Great Howard Street, Liverpool, and was on the ground level. It was connected with the company's main line, which was built at the height of twenty-two feet six inches above the level of the station, by means of an incline. The station was fenced off from Great Howard Street by a substantial wall with openings therein which were used for the purpose of admitting carts and lorries. These openings could be closed when necessary by sliding gates. The station covered an area of about sixteen acres and contained lines of rails, sidings, sheds,

cattle pens, and the other things mentioned in schedule A. Adjoining Great Howard Street was a large shed, marked A on the plan, with slate and glass roof carried on iron columns and covering an area of nearly 2½ acres. The shed was divided into five spaces, or bays, with four raised cartways or platforms, which were approached by roadways for carts which were on the ground level. Between each bay and at the ground level were lines of rails connected with the system of lines in the middle of the station yard. Another shed, marked B on the plan, covering about three-quarters of an acre, was more particularly used as a goods station for bales of cotton received from the docks. This shed was similarly provided with loading platforms and loading ways. The station premises also included a warehouse in respect of which no claim for exemption was made. The raised platforms or mounds which were provided in the sheds alongside of the sidings were used for the loading and unloading of goods into and from trucks, and also for the deposit of goods before such goods were despatched, or after such goods had been received and before delivery had been taken thereof. They were about three feet high, with paved surfaces and brick sides or retaining walls. On the west side of the yard there were certain cattle pens, extending for a length of 500 feet, adjoining the lines of rails as appeared on plan No. 1. The back pens, where the cattle were placed on their arrival from the docks and sorted, were uncoloured on the plan, and no claim for exemption was made in respect thereof. The front pens, which were coloured yellow on the plan, together constituted a loading platform for cattle, which was divided into several separate pens in order to prevent the cattle from getting mixed after they were sorted, and to enable them to be conveniently loaded into the trucks. The cattle passed from the back pens through the front pens into the trucks. There was also in the station a range of coal shoots or hoppers from the high level to the low level, for the purpose of transferring coal from railway waggons on the high level to carts on the low level in the station. The station was equipped with electric and hydraulic capstans for hauling waggons, and cranes for handling goods.

The Great Howard Street Goods Station was delineated upon

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an agreed plan contained in the appendix and marked plan No. 2.

The land, buildings, and other erections and fixtures comprising this station were by agreement divided into the different parts enumerated in the following schedule.

SCHEDULE B.

Description.	Colour on Plan.	Net Annual Value.
1. The roof over lines directly productive . .	Hatched red .	£143
2. The roof over loading platforms or mounds .	Hatched red .	75
3. The roof over loading ways or roads . .	Hatched red .	244
4. The loading ways or roads and the land thereunder	Brown . .	2716
5. The loading platforms or mounds and the land thereunder	Yellow . .	755
6. Sidings and turntables and the land thereunder	Sepia . .	564
7. Hoist houses and lands thereunder, hoists, capstans and their machinery . . .	Hatched blue	879
8. Approach roads to loading ways or roads and the land thereunder	Purple . .	264
9. Buildings and land thereunder and premises other than above	Uncoloured .	2705
Total rateable value . . .		£8345

The company claimed the statutory exemption in respect of items 1 to 8.

The various items are fully described in the special case, but for the purposes of this appeal the following description is sufficient.

This station was situated between Great Howard Street and Pall Mall, Liverpool, and was on the ground level. It was connected with the company's main line, which as before stated was built on a higher level, so far as the transit of goods was concerned, by means of an incline and by eight waggon hoists. These hoists were contained in substantial structures of brickwork. Four of them were worked by electric power and four by gravitation in which full waggons lowered down lifted up the empty ones. The floors of the hoists were provided with fixed rails on which the waggons ran. Locomotive engines did not go up or down the incline. Waggons loaded and empty went

down the incline, but all waggons going up were taken up by means of the hoists, the structure of the incline being considered to be of insufficient strength. The trains containing the goods from this station were made up and marshalled on the high level and the waggons to make up such trains were sent up singly by means of the hoists. The elevation to Great Howard Street was substantially built with openings in the walls which were used for the purpose of admitting carts and lorries. These openings could be closed when necessary by sliding gates. The station covered an area of about 12½ acres and contained sheds, lines of rails, sidings, waggon hoists, loading platforms or mounds, roadways, offices and workshops, &c., and the plant and appliances for loading goods and moving waggons into positions where they were required. The station was provided with a network of lines of rail connected to the waggon hoists and incline making every portion of the yard accessible by rail. There were numerous turntables worked by electricity provided at the various points in the station for working the traffic.

On the Great Howard Street side was a substantially built shed marked A on the plan No. 2 covering about 1½ acres and known as the "cotton shed." The shed was required and used for the protection from the weather of merchandise which was loaded or unloaded from or into carts or lorries into or from railway waggons. A large proportion of such merchandise passed direct from waggon to cart or vice versa and the residue was put on the loading mounds and was generally taken away the same day. The roof was covered with slates and glass and supported on iron columns. It was sufficiently high to permit of the working of hoisting jiggers and to swing goods as required. The jiggers were fixed at frequent intervals, attached to the underside of the roof, the motive power being received from a line of shafting attached to the roof. They were operated by men stationed on elevated gangways running along the whole length of the shed. Inside the shed were railway lines coloured blue, loading ways or roads coloured brown, loading platforms or mounds coloured yellow, turntables and capstans. The sides of the shed were boarded up except the lower portion, which was

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open to permit carts passing in and out. At each end of the shed was an elevated office formed by framing in part of the upper portion. The loading mound adjoining the cotton shed was used occasionally for storing returned cotton pending acceptance by the consignee, or in case of dispute pending the result of an arbitration. Such cotton remained there two or three days, but in some cases for a week or two. Adjoining the cotton shed was the cotton yard marked B on the plan provided with lines of rails, cranes and capstans, with roadways between the lines for carts to draw alongside the trucks. The premises also included three warehouses and several other buildings, such as an electric power house, engine and boiler houses, repair shops, stores, and general offices, in respect of which no claim for exemption was made.

With regard to both stations the recorder stated (clauses 17 and 30 of the case) that it was proved to his satisfaction that all the parts of the stations in dispute (i.e., items 1 to 9 in schedule A and items 1 to 8 in schedule B) were required and used for the purpose of the receipt, conveyance, and delivery of goods to be carried on their railway in the course of their business as a railway company and as common carriers; that the conveyance of goods in waggons upon the company's railway from and to the position in which the same were loaded and unloaded in and from railway waggons could not be conveniently effected without the said parts of the said stations, and that the same were not in excess of what was reasonably necessary for the purpose of such traffic as aforesaid. He also found (clauses 18 and 31 of the case) that subject to anything hereinbefore stated none of the said parts of the said stations were used for storage purposes, except that, as a necessary incident in the receipt, conveyance, and delivery of the goods which were sent from or arrived at the said stations, some goods from time to time remained for short periods on the loading ways and platforms until they were sorted and loaded on to the railway waggons or into carts for delivery to the consignees.

The corporation contended as to each station, first, that there was no evidence that any one of the items in dispute was land used as a railway, and, second, upon the construction of the

various Acts of Parliament by which the company was regulated, that assuming these goods stations were to be regarded as land used as a railway they were not a railway "made under the powers of any Act of Parliament for public conveyance."

The material provisions of the railway company's special Acts were set out in the special case and need not be further referred to.

The recorder held that all the items in dispute were (*a*) "land used as a railway," (*b*) "made under the powers of an Act of Parliament for public conveyance," and allowed the appeal subject to the special case.

The question for the opinion of the Court as regards each station was whether any and which of the items in dispute were rateable at one fourth only of their rateable value.

The Divisional Court (Lord Alverstone C.J., Pickford and Avory JJ.) held that none of the items in dispute was land used as a railway within the meaning of s. 36 of the Liverpool Corporation Act, 1893, although they were further of opinion that all the works in schedules A and B were constructed under the powers of the company's private Acts and the Railways Clauses Consolidation Acts.

The Court of Appeal (Vaughan Williams and Kennedy L.JJ., Joyce J. dissenting) varied the order of the Divisional Court as follows: They held that items Nos. 7 and 8 in schedule A relating to the North Docks Goods Station (the cranes mentioned in item No. 8 excepted) and items Nos. 6 and 7 in schedule B relating to the Great Howard Street Goods Station and no other disputed items in either schedule were rateable at one fourth only of their rateable values. Joyce J. was of opinion that the decision of the recorder ought to be restored in respect of the whole of the disputed items except item No. 9 of schedule A and item No. 8 of schedule B (the approach roads). Upon the question whether the several works in dispute were made under an Act of Parliament for public conveyance the Court agreed with the decision of the Divisional Court affirming the decision of the recorder.

The company appealed from this decision in so far as it affirmed the decision of the Divisional Court and asked that the

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decision of the recorder should be restored in all respects. There was also a cross-appeal by the corporation from the decision of the Court of Appeal in respect of those parts of the respective goods stations which were held entitled to exemption. At the Bar of the House the company abandoned their claim to exemption in respect of the approach roads.

1914. April 28, 30; May 4. *Balfour Browne, K.C.*, and *Ernest Page, K.C.* (with them *Greer, K.C.*, and *E. M. Konstam*), for the appellants. "Railway" when used in a taxing Act is not limited to the actual lines of rails, but includes all buildings necessary for the working of the railway: *Adamson* v. *Edinburgh and Glasgow Ry. Co.* (1), per Lord Cranworth. In *South Wales Ry. Co.* v. *Swansea Local Board* (2) Lord Campbell defined "railway" as used in the Public Health Act, 1848, as the line itself, the sidings and turntables upon which the carriages actually go, and so much of the land at the side as was occupied for necessary support of these, and also so much of the platform as was of the same width as the side of the railway adjacent. That definition leads to an absurdity and it has not been followed. In *Midland Ry. Co.* v. *Birmingham Borough Council* (3) Mellor J., while purporting to follow the *Swansea Case* (2), said that the only limit was what was necessary for the conduct of the traffic, and that if there were any excess it was a question of fact for the sessions. In this case the recorder has found that all the articles in controversy were necessary, as distinguished from convenient, for the conduct of the traffic, and his findings conclude the question in the appellants' favour. The appellants rely upon the reasoning of Joyce J. in the Court below.

Sir Robert Finlay, K.C., and *Leslie Scott, K.C.* (with them *Ryde, K.C.*, and *Edward Wooll*), for the respondents. In *Adamson* v. *Edinburgh and Glasgow Ry. Co.* (1) the word "railway" was used as including the whole undertaking and the observations of Lord Cranworth have no bearing on the meaning of the term as used in the Public Health Acts. Lord Cranworth himself says that the term is ambiguous and must be construed with reference

(1) (1855) 2 Macq. 331. (2) 4 E. & B. 189; 24 L. J. (M.C.) 30.
(3) (1865) 13 L. T. (N.S.) 404.

to the purposes of the statute in which it occurs. The respondents' contention is that the word "railway" in this statute means the rails and sleepers and what they rest on plus the cuttings and embankments and the land between the boundary fences, and that at the stations it includes only the line proper. They accept the principle of the *Swansea Case* (1) absolutely with the small exception as to the portion of the platforms. The platforms are not part of the railway. In this Act the word "and" after "land covered with water" must be construed as "or" and the word "only" must be applied to "railway," for the words will not make sense as they stand. This view has been accepted by all the Courts. This clause originally appeared in the Public Health Act of 1848 (s. 88) and was repeated in the Public Health Act of 1875, and, according to well-established principles, the words when used in the local Act must be taken to be used in the sense in which they have been judicially interpreted in the prior Acts: *North British Ry. Co.* v. *Budhill Coal and Sandstone Co.* (2) Therefore this clause must be construed as in 1848 and the principle of the *Swansea Case* (1), which was a decision upon the Act of 1848, applies. At that time the idea of a railway differed materially from the modern idea and it was looked upon as a highway for the common use of the public. The railway company might be merely toll takers and neither conveyers nor carriers, or they might be conveyers but not carriers, or they might be carriers also: *Hall & Co.* v. *London, Brighton and South Coast Ry. Co.* (3); *Sowerby & Co.* v. *Great Northern Ry. Co.* (4) These two cases draw a contrast between a conveyer's business and a carrier's business and show that a platform is connected with the latter business. It is therefore not included in the statutory exemption, which is confined to what is necessary for conveyance pure and simple. All the things which are now in dispute are really parts of the stations, which admittedly are not included, as distinguished from parts of the railway, and were constructed as such. *Midland Ry. Co.* v. *Birmingham Borough Council* (5) dealt solely

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30.
(2) [1910] A. C. 116, at p. 127.
(3) (1885) 15 Q. B. D. 505, 536, 537.
(4) (1891) 7 Ry. & Ca. Tr. Cas. 156.
(5) 13 L. T. (N.S.) 404; 30 J. P. 197.

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with sidings and turntables and it was there found that they were necessary for the working of the line. *London and North Western Ry. Co.* v. *Llandudno Improvement Commissioners* (1) is inconsistent with the *Swansea Case* (2) and with sound principle and ought to be overruled. "Railway" in this statute means a railway going from point to point; a railway used for conveyance as distinguished from land used for a carrier's business; the railway proper as distinguished from the railway premises. All the parts of the stations in dispute receive the full benefit of the rate and are therefore not entitled to the statutory exemption. [They also contended on grounds set out in the previous report of the case that the low level railway was not a railway "made under the powers of any Act of Parliament" within the meaning of the statute.]

Balfour Browne, K.C., in reply. Getting the goods on board is incidental to their conveyance. Therefore the railway includes the loading platforms, which are required for the purpose of getting the goods into the trucks, and the land on which the cart stands during the loading; and the roofs over the platforms and loading ways are in a similar position. *Hall & Co.* v. *London, Brighton and South Coast Ry. Co.* (3) and *Sowerby & Co.* v. *Great Northern Ry. Co.* (4) were decided upon provisions framed for a different purpose and have no bearing on the present case.

The following authorities were also referred to:—*Newport Dock Co.* v. *Newport Local Board* (5); *Reg.* v. *Eastern Counties Ry. Co.* (6); *North Eastern Ry. Co.* v. *Leadgate Local Board* (7); *North Eastern Ry. Co.* v. *Scarborough Local Board* (8); *Midland Ry. Co.* v. *Ambergate, Nottingham, and Boston and Eastern Junction Ry. Co.* (9); *Williams* v. *London and North Western Ry. Co.* (10); *Wakefield Corporation* v. *Wakefield and District Light Ry. Co.* (11); *Thornton Urban District Council* v. *Blackpool and*

(1) [1897] 1 Q. B. 287.
(2) 4 E. & B. 189; 24 L. J. (M.C.) 30.
(3) 15 Q. B. D. 505.
(4) 7 Ry. & Ca. Tr. Cas. 156.
(5) (1862) 2 B. & S. 708.
(6) (1863) 32 L. J. (M.C.) 174.
(7) (1870) L. R. 5 Q. B. 157.
(8) (1869) 33 J. P. 244.
(9) (1853) 10 Hare, 359.
(10) [1900] 1 Q. B. 760.
(11) [1908] A. C. 293.

Fleetwood Tramroad Co. (1); *Tottenham Urban District Council* v. *Metropolitan Electric Tramways.* (2)

The House took time for consideration.

May 26. LORD DUNEDIN. My Lords, under the provisions of the Liverpool Corporation Act of 1893 the respondents have the power of imposing a general rate on all lands and hereditaments within the township. That rate is imposed on the net annual value of the said lands, &c., as they are valued for the purposes of the poor rate. There are, however, certain exemptions, and the present case turns upon the meaning of the second exemption in the 36th section of the Act, which is in the following terms :—

"No person occupying land used as arable meadow or pasture ground or orchards or allotments only or as woodland market garden or nursery ground or any land covered with water and used only as a dock or a canal or the towing-path thereof or as a railway made under the powers of any Act of Parliament for public conveyance shall be rated in respect of the same to the general rate in any greater proportion than one-fourth part of the net annual value thereof."

The properties of the appellants as to which the questions arise are situated at two places admittedly within the township, and are known by the general names of the North Docks Goods Station and the Great Howard Street Goods Station respectively. By agreement between the parties the particular items of which the properties are composed have been grouped under numbered heads in two schedules. It is unnecessary to trouble your Lordships with reading them. For the purposes of discussion they divide themselves into groups, to wit—

1. Sidings and turntables.
2. Loading platforms or mounds for (*a*) goods, (*b*) cattle.
3. Loading ways or roads.
4. Hoist houses, capstans, and cranes.
5. Approach roads.
6. Roofs over (*a*) running lines, (*b*) loading platforms and ways.
7. Buildings.

(1) [1909] A. C. 264. (2) [1913] A. C. 702.

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There fall also to be mentioned the running lines, which are not included in the schedule because they are valued along with the other lines of the railway classed as directly productive.

The appellants admit that No. 7, buildings, are not entitled to any exemption. They also in the argument before your Lordships abandoned their contention as regards No. 5, approach roads. The respondents in the case of the North Dock station admit that the exemption applies to No. 1, sidings and turntables—a concession which they did not give as regards the Great Howard Street station. In respect to all other items the parties are in controversy.

The question therefore is, do any and, if so, which of the disputed items fall within the expression "used as a railway made under the powers of any Act of Parliament for public conveyance"?

An argument was presented to your Lordships that inasmuch as many of these items were part of the general works, and not of the running line, and inasmuch also as they were partly constructed on land acquired for general purposes under the general clauses of the Railways Clauses Act, they were not a railway made under the powers of an Act of Parliament for public conveyance. I do not think that this view commended itself to any of your Lordships, and I only mention it to show it has not been overlooked.

Assuming for the moment that they are properly described as being used as a "railway for public conveyance"—which is the real question in the case—it seems impossible in any ordinary use of language to deny that they have been made under the powers of an Act of Parliament—seeing that the general Acts here, as always, are incorporated in the special Act.

I pass therefore to the consideration of the question whether the various items are used as railway. Now the clause in question is the echo of many such clauses, one of the earliest and most discussed of which is to be found in the Public Health Act of 1848. The section is almost textually the same. I do not pause to consider the controversy whether the insertion of the word "and" after "water" in the Liverpool clause, as

contrasted with the word "or" in the same place in the Public Health Act, has the grammatical effect of preventing the word "only" being applicable to the use as railway. To my mind it is immaterial. The real question is, are these hereditaments used as "railway" or not?

My Lords, the earliest case that seems to have arisen upon the question is the case of *South Wales Ry. Co.* v. *Swansea Local Board of Health* (1), decided in 1854. Since then all the judgments pronounced have professed to follow the *Swansea Case* (1) —though it is not very easy to reconcile the results with what was said in *Swansea*. (1) This is partly to be accounted for by the fact that the station in the *Swansea Case* (1) was spoken of as if it were a wayside station, and that some of the expressions used in the judgment are really not applicable to the cases of terminal stations. Yet it is certain that the *Swansea Case* (1) has had an influential effect on the practice of rating. I apprehend that your Lordships would be very unwilling, unless absolutely compelled by the words of the statute, to overturn a course of practice which had the sanction of so many years merely because the question is for the first time brought before this House. I make this remark because I cannot help thinking that if the question arose for the first time it might be found that the word "railway" in its popular significance suggested other ideas from what it did in 1848. All railway companies are now carriers and nothing else. In early days, as is well known, they were looked at from another point of view. The various authorities are, however, not consistent, and we are therefore bound not only to come to a conclusion as to the particular items in this case, but also, if possible, to indicate some general rule which may serve to regulate other cases as they arise.

My Lords, I agree with the learned judges in the Court below that the case of *Adamson* (2), which was appealed to as affording helpful reasoning by Pollock B. in the *Llandudno Case* (3), is really of no assistance. The question there was what, under the Scotch system, fell to be separately rated by

(1) 4 E. & B. 189. (2) 2 Macq. 331.
(3) [1897] 1 Q. B. 287.

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the special railway and canal assessor, and turned on the words of the Scotch Valuation of Lands Act. The answer was, the railway as an undertaking. That includes stations in the widest sense of the term, and that at once shows how little it can help us here. I am therefore content to take the *Swansea Case* (1) as a starting point, and to use it, for what was actually decided—though I should not wish to associate myself with all the observations that were made in the judgment. It seems to me that the two leading propositions to be deduced from the decision in the *Swansea Case* (1) are—(1.) that railway does not mean merely ground covered by rails, but includes ground at the side of the rails—which may be used in more ways than one, i.e., in that case either as waste ground between the fences or as platform; and (2.) that railway does not include station buildings. Reverting now to the expression in the statute, "used as a railway under the powers of any Act of Parliament for public conveyance," that seems to me to point to the rails themselves plus whatever ground is used in connection with the rails in relation to their use as a means of conveyance. Now, conveyance is effectuated by the pulling of trucks or carriages along the lines of rails, and such trucks and carriages are intended to be full and not to be empty. Such ground, therefore, as is used either for shifting a truck from one line to another, as, e.g., a siding, or a turntable, or is used in connection with the loading or unloading of a truck, as, e.g., a platform or loading bank, is, in my view, used in the sense of the statute as a railway. What precise amount of ground falls under this description is a question of fact to be determined in each instance by the proper authority. On the other hand, when we come to what are not necessary adjuncts of conveyance, but are buildings used in connection with the business of carriers,—such as waiting rooms, goods stores, and largely extended platforms for the convenience of passengers waiting at the station—we are no longer within the words of the exemption

Applying these views in detail, I come to the conclusion that the first four of the groups I enumerated, namely, sidings and turntables, loading platforms and mounds for goods and cattle,

(1) 4 E. & B. 189.

loading ways and roads, and hoist houses, capstans, and cranes, are entitled to the exemption. To prevent misapprehension in other cases I ought to explain that the expression "loading ways and roads" does not apply, as will be seen by reference to the agreed-on plan, to any ordinary roads or ways of approach, but only to those spaces which it is necessary the lorries and carts should occupy in order to be in juxtaposition to the actual mound, bank, or platform on which the goods are unloaded. As regards the hoists, these seem to me to be, in the circumstances, in just the same situation as turntables, for they are the means of transferring the trucks vertically from one line of rails to another, just as the turntables are the means of transferring them horizontally.

The sixth and seventh heads, approach roads and buildings, which are, in fact, conceded not to be exempt, naturally fall to be excluded according to the principle I have laid down.

It remains to deal with the roofs.

This seems to me to depend on the actual facts of the case. I can conceive cases where a roof was only an adjunct of the platform or rail beneath it, and, as such, followed its fate. But I cannot read the description of these roofs, and look at the photographs which are incorporated with that description, without coming to the conclusion that these roofs are no mere appanage of the rails or platforms beneath them, but are in themselves substantial buildings, and, therefore, not entitled to share in the exemption.

I, therefore, move that the order complained of be reversed, and the case remitted with the following declaration: that items 4 to 8, inclusive, in schedule A, and items 4 to 7, inclusive, in schedule B, are entitled to the exemption and fall to be rated at one fourth, the other items to be rated at full value.

The cross-appeal will be dismissed with costs. The appellants to have the costs of the appeal here and below.

I am desired by my noble and learned friend Lord Shaw to say that he concurs in the judgment which I have just read.

Lord Atkinson. My Lords, I concur. It is unnecessary to re-state the facts. The principal questions for decision in this case

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are, first, the proper construction of s. 36, proviso ii., of the Liverpool Corporation Act of 1893—the meaning of the words "used as a railway made under the powers of any Act of Parliament for public conveyance" which occur in it, and, second, the application of the sub-section when so construed to the premises and works of the appellants mentioned in schedules A and B, in the special case contained, or to some, and which of them. I assume, although it is questionable, that the section is to be construed as if the word "only" was found in it after the word "used." Provisions similar to those of this sub-section are admittedly to be found in the Public Health Acts of 1848 and 1875. The general principle upon which the differentiation of rating they authorize appears to be based is this, that, it being the common characteristic of the several kinds of land mentioned in them other than land "used only as a railway" that they have not been utilized for buildings, the occupation of these kinds of land is supposed not to be much increased in value by the expenditure of the rates; and that as regards land "used only as a railway" the principle of noscitur a sociis applies, and it too is only to be rated at the lower rate when no buildings have been erected upon it. Well, in the first place, whether the occupation of land derives more benefit from the expenditure of the rates when built upon than when not built upon depends very much, it would appear to me, on the nature of the building. For instance, in the case of a loading bank or platform for loading cattle or goods, which appears frequently to be nothing but a mound of earth faced on one side with a dwarf wall, the occupation of the land upon which this mound is heaped up does not necessarily, nor indeed probably, derive more benefit from the expenditure of the rates than it did before the platform was constructed. It is clear from the case of *Purser* v. *Local Board of Health for Worthing* (1) that the existence of buildings upon one of the kinds of land mentioned in the sub-section is not per se a crucial test as to the scale of its rateability, especially if those buildings are necessary or beneficial for that very use of the subject which the name given to it in the statute suggests.

(1) (1887) 18 Q. B. D. 818.

In that case, upon a plot of ground, one acre and one rood in extent, sixteen glasshouses or greenhouses of various sizes were erected. They were built upon dwarf brick walls like an ordinary greenhouse, and they covered all but a very inconsiderable portion of the plot. The occupier used them for the purpose of growing, for sale, tomatoes, cucumbers, grapes, and, to a smaller extent, other vegetables, all of which were grown within them. Vines were planted in prepared beds outside the houses, and their stems carried through apertures to the insides of eight of these houses. It was held that the plot of land thus covered by buildings and devoted to this use was "used only as a market garden" within the meaning of s. 211, sub-s. 1, of the Public Health Act, 1875, on the ground, as stated by Lord Esher, that "the land is not the less used as a market garden because these glasshouses have been placed upon it." The glasshouses were buildings. They were ancillary to the use of the land for a purpose which secured exemption from three fourths of the rate. In the case of a railway, the land upon which a viaduct, for instance, is built must, I think, be held to be, primarily, land used "only as a railway," and it is rather difficult to see why land "used only as a railway" should lose the benefit of the partial exemption from rates because platforms and such like things have been erected upon it ancillary to, and absolutely necessary for, the very use which secures a lower rating in respect of it.

The decisions of both the Divisional Court and the Court of Appeal in the case have, in truth, been based upon the decision, pronounced nearly sixty years ago (November 11, 1854), in the case of *South Wales Ry. Co.* v. *Local Board of Health of the Borough of Swansea* (styled in argument the *Swansea Case*), reported in 4 E. & B. 189 and 24 L. J. (M.C.) 30. During the argument the phrase was frequently used, "the principle of the *Swansea Case*." With the profoundest respect for the great judges who decided that case, I feel bound to say that if the judgment be taken as a whole, one finds some difficulty in discovering what precisely is the principle which it establishes.

It was urged in argument again and again that the ground

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upon which a railway platform is built, though "used only as a railway" before that event, ceases from thenceforth to be so used, on the ground, as I understood, that the platform is only erected as a convenience for the conduct of the business of the owners of the railway as common carriers, and not as a structure necessary for the physical traction of trains or loaded waggons over the railway lines. But that contention is in the very teeth of the decision in the *Swansea Case*. (1) It was there held that the land upon which half of the platform was erected continued, notwithstanding that erection, to be land "used only as a railway" within the meaning of s. 88 of the Public Health Act of 1848, and was accordingly to be rated on the lower scale. The case is, therefore, a clear decision that land upon which a platform has been built may after that event still be treated as land "used only as a railway" within the meaning of this statute if, before that event, it was properly so treated. When one looks at the plan printed at p. 32 of the report of the case in 24 L. J. (M.C.), this is all the more apparent, for the two platforms whose rateability was divided were situate in the passenger station, and ran along the outer sides of the two main lines. Between those two main lines, Nos. 1 and 4 respectively, ran two sidings, numbered 2 and 3 respectively. If the land on the outside of the main lines up to half the extent of the sites of the platforms, taken longitudinally, is notwithstanding their erection to be taken as land "used only as a railway," it would seem reasonably to follow that the strip of land between those main lines, even if sidings had never been placed upon it, should be held to be land "used only as a railway," and that if an island platform had been built upon it, the site of the platform should still be treated as land "used only as a railway." Sir Robert Finlay, who appeared for the respondents, was, by the very necessities of his case, driven to contend that this portion of the decision in the *Swansea Case* (1) was erroneous. But if that decision, conversant as it is with ideas touching the working of railways, and with notions as to the rights of the public over them wholly different from those which have from the year 1874 prevailed, is, despite its antiquity, to be treated as of such

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30.

commanding authority that modern legislation must be interpreted in the light of it, this jettison of half what was decided in it is, I think, wholly inadmissible. Moreover, it has been expressly admitted by the respondents in this case, as common sense, indeed, and reason seem to me to require that it should be, that all the land comprised within the fences of a railway line should primarily, at all events, be taken to be "land used only as a railway." If that be so, then I think this decision establishes that the sites of platforms, signal boxes, water tanks to supply water to locomotive engines to enable them to generate steam, sidings, turntables, and such like works built and constructed on the land within those fences, must to the extent that they are necessary for the performance of those physical operations the railway was created to perform be treated as land "used only as a railway." To that extent I am unable to distinguish the position of the sites of such works from the sites of the halves of the platforms held in the *Swansea Case* (1) to be rateable only on the one-fourth scale. Of course a railway company may, for the convenience or attraction of passengers, construct platforms, stations, and such like works on a scale much more vast and magnificent than is absolutely necessary for the reasonable conduct of its traffic, and may equip them with things which are the luxuries or conveniences of railway travelling rather than the necessaries. In such cases it will be the task of the rating authority to take into consideration what is necessary, and what superfluous, and to fix the limits of the exemption from the full rate accordingly; but even in this it should be remembered that the luxuries of one age often become the necessities of the succeeding age.

Again, referring to the map used in the *Swansea Case* (1), it appears that two sidings, the land under which was held to be rateable on the one-fourth scale, ran into the goods station very much as the sidings coloured blue on plan No. 1 used in this case run into the sheds or buildings marked A and B.

It is quite true that in the *Swansea Case* (1) the Court held that the land upon which the station buildings, other than the platform so divided, the offices, engine sheds, tanks, waterworks,

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30.

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and other fixed plant and machinery were built and erected could not be held to be "land used only as a railway," though necessary for the handling by the company of its traffic, and occupied by them for that purpose, but it does not appear from the case whether or not the land forming the sites of these buildings was, before their erection, "used only as a railway." If it had been, then as to the tanks and waterworks, if made to supply the locomotive engines with water to enable them to generate steam to haul the trains, and the sheds, if made to shelter and protect those locomotives, it is difficult to see upon what ground their sites could be distinguished from the portion of the sites of the platforms directed to be rated on the one-fourth scale. I equally fail to see on what principle a structure like a platform built upon land theretofore "used only as a railway" in order to enable intending passengers to enter the carriage they desire to travel in from the same level as the floor of those carriages, instead of clambering up their sides from the ground, can be distinguished from a loading bank designed to enable cattle to enter trucks on the level of the floors of those trucks, or to enable goods to be put into those trucks more conveniently from such a level. In my view, therefore, it necessarily follows from this decision that, having regard to the admission made in this case, the sites of passenger platforms and goods platforms built on land comprised within the railway fences must be treated as land "used only as a railway," provided always that these erections are necessary for the handling of the traffic of the railway.

It is no doubt quite true, as is stated by Wills J. in *Hall & Co.* v. *London, Brighton and South Coast Ry. Co.* (1), that "this notion of the railway being a highway for the common use of the public, in the same sense that an ordinary highway is so, was the starting point of English railway legislation. It is deeply engrained in it." The words "conveyed on the railway" in the definition of "toll" in s. 3 of the Railways Clauses Act of 1845 must then have meant "conveyed" either by the company itself or by some person or body authorized to use the railway line for that purpose; but to use the words of Mellish L.J. in the case of

(1) 15 Q. B. D. 505, at p. 536.

Powell Duffryn Steam Coal Co. v. *Taff Vale Ry. Co.* (1), "the Railways Clauses Act was passed at a time when the working of railways was not well understood. The Legislature seems to have considered that there was no more difficulty about running over a railway than along a turnpike road. It is found now that the use of points and signals is required." It was held in that case that the Court of Chancery had no power to compel the railway company to work the signals for the safe conduct of the engines and trains of others, and that unless that was done the use of the railway by those others, on the turnpike road principle, became dangerous and indeed impossible. And from that day (the 21st of February, 1874) till the present time the running of trains or waggons over a railway system or any part of it by persons or bodies other than those who own the line or have by statute running powers over it never, I think, enters into the contemplation of any one, and cannot be presumed to have been within the purview of the Legislature when it passed the Act of 1893.

Railway companies were not incorporated nor railways authorized to be constructed in order that empty carriages and trucks might be hauled along the lines backwards and forwards from place to place. Their proper function was then thought to be to convey, or permit to be conveyed over them by third parties, passengers in carriages and goods in loaded trucks. The permissive portion of their function has for forty years become obsolete. What, then, can be meant in such a statute as the Liverpool Corporation Act of 1893 by the description "land used only as a railway made under the powers of an Act of Parliament for public conveyance"? Must it not be a railway one of whose functions necessarily is the physical operation of conveying passengers in carriages, and goods in loaded trucks, from one place to another over its rails, an operation which cannot be performed unless the passengers get into the carriages, and the goods be put into the trucks?

The words of the statute, as Joyce J. points out, are not "used only as a line or lines of rails," but "used only as a railway." Now it is admitted in this case that land is "used only as a railway" when it is fenced off from the adjoining land

(1) (1874) L. R. 9 Ch. 331, at p. 334.

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so as to prevent access to it from this latter land and a line of rails has been laid upon it. No matter how little of the enclosed land these rails occupy, all the strips of land between the sleepers on which the rails are actually laid and the fences continue, while unused for any other purpose, to be admittedly used "only as a railway." When upon this land structures have been erected necessary to enable the railway company to perform the very physical operation it was created to perform, transport passengers in carriages and goods on loaded trucks along its rails, there seems no reason why its character should be taken as changed.

The same considerations apply to the unloading of goods. Goods are not, properly speaking, conveyed from one place to another if they are not unloaded at their destination. Sidings very often lead to nowhere. They are used for many purposes, such as shunting slow trains off the main lines to allow quick trains to pass, marshalling trains, taking up and detaching carriages and trucks. Many times, as in the *Swansea Case* (1) and this case, they run into goods stores and lead directly up to loading mounds or platforms. The land under sidings of this kind has been invariably held to be land "used only as a railway," because the moving of passenger carriages and trucks over them is ancillary to and absolutely necessary for the performance on the main lines of the railway of the very physical operation which the railway was created to perform. It is immaterial whether these sidings are bounded by high walls or are covered with a roof. Main lines of railway are often so bounded, and at places so covered, yet it could not be contended that at such places the land under these lines is not "used only as a railway," and I, myself, fail to see how, if the land under a siding, made and used for the very purpose of bringing trucks up to a loading bank, is to be held to be land "used only as a railway," the land under the loading bank itself, equally necessary for the conveyance of goods, is not equally land "used only as a railway."

It is not enough to say, as the respondents have said, that in the loading and unloading of goods the railway company

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30.

are only acting in their capacity of common carriers, and that the erection of a loading platform is a work done by them in that character for the conduct of that business. They convey goods, however, from place to place along their main lines as common carriers also. They have all the rights and liabilities and duties of common carriers in respect of those goods for every portion of the journey, but the land under the main lines is none the less held to be land "used only as a railway."

Up to the present case the tendency of modern decisions has been to make property which is an adjunct to a railway more and more rateable at the lower rate.

In the case of *Midland Ry. Co.* v. *Birmingham Borough Council*, reported in 13 L. T. (N.S.) 404, and more fully in 30 J. P. 197, the company claimed to be rated at the lower rate in respect of land on which passenger and goods stations, warehouses, stables, workshops, cattle stalls, &c., were built, and also upon land, 10½ acres in extent, upon which sidings and turntables were constructed. These sidings and turntables were used for loading and unloading trucks, and also as standing places for laden and unladen trucks. Some of the sidings ran into goods stores as in the present case. It is, I think, common knowledge that the well in which a turntable works is built round with a dwarf brick wall. This is, I should think, in many instances quite as much a building as a loading bank. Well, these sidings and turntables were found in the case stated "to be necessary for conducting the traffic of the railway, and had been recently enlarged as the traffic increased." It was held that the company were to be rated only at the lower rate in respect of their occupation of the entire 10½ acres of land, and at the higher rate in respect of the other works and buildings already mentioned. Speaking of the former, Mellor J., after expressing his agreement in omnibus with the decision in the *Swansea Case* (1), said (2) "the word 'railway,' on a reasonable construction of it, means this: not only the actual lines of railway necessary for carrying goods and passengers from A to B, but all turntables and sidings and so on which are necessary

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30.

(2) This quotation is taken from a transcript of the judgment supplied to the Recorder (Appendix, p. 41).

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for the purpose of conducting the traffic of the railway. If they are sidings which are not used for that purpose, and not necessary for that purpose, but which are in the nature of warehouses, then they become rateable at the full value; but if they are simply sidings and turntables, and so much of the platform as is mentioned in the *South Wales Railway Case* (1), it is clear that it must have extended far beyond the mere lines of railway; and I can see no other limit than 'what is necessary for the conduct of the traffic.' If there is any excess, it is a question of fact for the sessions, but here there is no difficulty about that, because on the finding of the case all that the appellants claim to have rated at one-fourth of the net annual value are the turntables and the sidings which are necessary for the purposes of traffic."

Shee J. said: "It seems to me that the only question for us to determine is what within the meaning of the proviso of the local Act are the words 'land used as a railway,' or if that be the construction of it, and I think it is, 'land used only as a railway'? Do these words mean land occupied by the rails, and those rails only on which goods and passengers are carried from place to place, or do they also mean land used for the purpose of moving and turning carriages upon the rails, and for the access of goods and passengers to the rails? It seems to me that they may have the second meaning as well as the first."

This is a distinct approval of the portion of the judgment in the *Swansea Case* (1) which Sir Robert Finlay rejects.

The next case in this process of evolution is that of *North Eastern Ry. Co.* v. *Scarborough Local Board* (2) (heard in 1869). There two questions arose for decision on the corresponding section of the Public Health Act, 1848, namely, first, whether the land under certain sidings, platforms, and turntables, and second, whether a strip of land by the side of the railway (all of which were delineated on a map, not, however printed in the report), should be assessed at the full rate, or as land "used only as a railway" at one fourth of the full rate. The *Swansea Case* (1) was cited as an authority that the several hereditaments first mentioned should be rated at one fourth of their annual value as part of the

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30. (2) 33 J. P. 244.

railway itself, and the Court, consisting of Lush, Hannen, and Hayes JJ., so decided. Mr. Manisty admitted in argument that the sidings, platforms, and turntables there might be taken as part of a railway, but contended that the strip of land by the side of the line could not.

Lush J. in giving judgment said: "As to the other point we think the rate was bad, in so far as it did not include the sidings, turntables, and platforms, as part of the railway; but as to the strip of land that is a question of degree as to which the arbitrator alone can decide. Therefore, we answer yes to the first question, and as to the second question we remit the case with our opinion, that the sidings, &c., and so much of the strip of land as is necessary to the use of the railway, should be included as part of the railway." It is to be regretted that the map is not reproduced in the report, as it would enable one to ascertain what was the position, nature, and extent of these buildings, and also of this strip of land. It is plain, however, that the *Swansea Case* (1) was treated as an authority for rating at the quarter scale the land which forms the site of the platforms.

The only other case to which I think it necessary to refer at any length is that of *London and North Western Ry. Co.* v. *Llandudno Improvement Commissioners.* (2)

The Llandudno Improvement Act, 1854, by its 67th section empowered the respondents to make an annual rate, called an improvement rate, on land and other property of every description for the time being liable to be rated for the relief of the poor within the limits of the Act according to its annual value. The 68th section, in words almost identical with those of the sub-section under consideration in the present case, enacted amongst other things that the occupiers of land "used only as a railway" should only be assessed in respect of one fourth of its annual value.

The case dealt with fourteen items of property. Of these items Nos. 12, 13, 14, namely, "signal boxes and appurtenances, engine turntables and sidings," the respondents admitted should only be assessed at a quarter of the full annual value of the land on which they were constructed.

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30. (2) [1897] 1 Q. B. 287.

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The question for the opinion of the Court was whether the appellants were liable to be assessed and rated in respect of the other properties mentioned in the schedule at one fourth of the full net annual value or at the full net annual value itself. The Court, consisting of Pollock B. and Wills J., treated the *Swansea Case* (1)—rightly, as I think—as an authority for the proposition that where a platform, necessary for the conduct of the traffic of a railway, is built upon land theretofore used "only as a railway," this land did not cease, by reason of that erection, to be "land used only as a railway." There is, in fact, no trace, in this or any other of the cases in which the decision of the *Swansea Case* (1) was approved, of any exception having been taken to the decision on this point such as the respondents, conveniently for themselves, desire now to take to it. In the result the judgment was that the land upon which the platforms, covered and uncovered, and the said sidings were built and made was still to be treated as land "used only as a railway," and that, apparently, the roofs covering the railway, as well as those covering the several other works mentioned, were to be excluded in estimating the value of the occupation of the land so used, but that the remainder of the eleven items should be valued at their full annual value. I quite share the astonishment expressed by the learned Recorder of Liverpool in the special case in reference to the portion of the judgment in which it was held that the land upon which the cattle landings, cattle pens, and cranes in the goods yards were erected was rateable at its full value, while that under the platforms was not. Unless there was something very peculiar in the extent or nature of these cattle landings and pens, which does not appear, I think it is impossible to distinguish them from platforms. The same principle appears to me to apply to both. Neither do I think it is possible to distinguish on any rational principle the bays between the loading banks or platforms in buildings A and B (plan No. 1) from the loading banks or platforms themselves. The entire of the floors of these buildings are therefore in my view, on the facts found, properly to be treated as "land used only as a railway." On the whole, therefore, I am of opinion

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30.

that the appellants are entitled to succeed as to items 4, 5, 6, 7, and 8 in schedule A, and as to the corresponding items, Nos. 4, 5, 6, and 7, in schedule B. I think they fail as to items 9 in schedule A and 8 in schedule B. As regards items 10 in schedule A and 9 in schedule B, I think on the findings of fact the appellants fail as to those also. With reference to items 1, 2, 3 in each schedule, I understand the contention of the appellants to be that the addition made to the value of the occupation of the land or works underneath these roofs is to be excluded in computing the rateable value of that occupation. I am not quite able to appreciate the nature of their claim unless it amounts to this. No doubt these roofs are a great convenience. They would be absolutely necessary to buildings A and B if they were really used as warehouses, goods being stored in them for any considerable time, but I doubt much if they can be considered as necessary for the handling of the traffic of the railway, or can be considered otherwise than as part of the large building on the high and substantial walls of which they rest. I do not think they can be treated as divided into strips or portions, each covering a platform or a line of rails, or a bay between the loading banks, as the case may be. The roof over each of these two buildings, A and B, must, I think, be treated as a whole.

I therefore am of opinion that the appellants fail as to those items, and I approve of the order that has been suggested by my noble and learned friend on the woolsack.

Lord Sumner. (1) My Lords, in this case, as to various descriptions of railway property, we have to answer this question: "Does the Lancashire and Yorkshire Railway Company, which occupies the land on which they rest, use that land as a 'railway'?", which is the language of the Liverpool Corporation Act, 1893, s. 36, proviso ii. It seems simple, and the other questions are simpler still, and may be got rid of at once. The different subject-matters were not made for private as opposed to public purposes. Clearly each item was made under the powers of Acts of Parliament for the purposes of "conveyance," and whether originally they were made as railways or as accommodation

(1) Read by Lord Dunedin.

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or other works matters not, if they are now used as a railway. Further, it has so often been said in decisions on this or equivalent sections that the user must be "only" as a railway, that I shall assume it to be so without discussion (e.g., per Wills J. (1); Sir Gorell Barnes P. (2); Cozens-Hardy M.R. (3)). To return to the principal matter. Ten items were included in the disputed rate upon the North Docks station, and nine in that upon the Great Howard Street station. Certain lines of railway (coloured blue on the plan) never were included in this assessment at all, but were otherwise assessed by the rating authority. The railway company recognizes that the buildings have been rightly rated in full. The rating authority has given certain other lines of railway, consisting of sidings and turntables (coloured sepia on the plan), the benefit of the exemption at the North Docks station, but not at the other; but this, it seems, was by way of concession, and not of admission. Counsel for the rating authority argue that the concession was itself a backsliding from the pure and uncorrupted doctrine of rating law, attributable to the weakness or the moderation of a surveyor.

The remaining items consist (*a*) of a group of platforms—goods platforms arranged in bays, cattle platforms or mounds alongside a particular line, and loading ways for carts, adjacent to railway lines or goods platforms; (*b*) of the roofs over some of these platforms or parts of them; (*c*) of hoist houses and cranes; and (*d*) of approach roads. By the learned recorder the railway company were held to be entitled to exemption in all cases, though at your Lordships' Bar counsel no longer support his judgment as to the approach roads. The Divisional Court unanimously held them entitled to exemption in none. By a majority the Court of Appeal held that there should be exemption in the case of hoist houses but no further, not even in the case of cranes. Joyce J., dissenting, held that there should be exemption in all the cases in dispute, except that of the approach roads. Even for a rating case this shows a notable variety of opinion, and I do not doubt that vigilant scrutiny may hereafter detect

(1) [1892] 1 Q. B. at p. 360. (2) [1907] 1 K. B. at p. 579.
(3) [1907] 2 K. B. at p. 267.

some semblance of difference among your Lordships' opinions also. I dare not hope that the decision of this House is ideally right, but there is at least some consolation in reflecting that it is final.

My Lords, I need not describe the different items of assessment. The case stated describes each fully, and the Judicature Act, 1894, s. 2, gives power to draw further inferences of fact. Parts of the conclusions stated in paragraphs 17 and 30 of the special case appear to me to be irrevelant, but they are severable. The material conclusions are that all the matters in question are "required . . . . for the . . . . conveyance of goods to be carried on the railway"; that "the conveyance of goods in waggons upon the company's railway, from and to the position in which the same are loaded or unloaded in and from railway waggons, could not be conveniently effected without the said parts of the said station"; and that, as to quantum, the provision of these matters is not in excess of what is reasonably required. Further, I read the case as finding that such amount of occasional storage on the different platforms, or rather retardation of delivery from them, as is mentioned, is not in truth enough to prevent the user, that is by the occupying railway company, from being user "only" as a railway. I think that in this section "only" represents substance and not a scruple.

If the matter were now res integra, as it was from 1848 to 1854, much might be said for the view that "land used as a railway" does not extend beyond the railroad and the road bed, "the land upon which the rails rest or which is necessary for their support, and such physical adjuncts upon that land, for example, signal boxes, turntables, and sidings, as, though not actually part of the rails, are necessary for the mechanical work of using the railway." (1) My Lords, these words of Kennedy L.J. in the Court below are very forcible, and I feel the weight of his next sentence: "Directly you go beyond this and admit to the one-fourth scale of rating buildings and structures, not necessary for the physical use of the rails, but erected in connection with their use for the more convenient or more profitable working by the railway company of its business as a carrier . . . . , you deviate

(1) [1913] 3 K. B. at p. 288.

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. . . . from the line prescribed by the principle of the legislation which has decreed the exemption for 'land used only as a railway.'" Still, I think it is too late now to go back to the section as if it had not been the subject of decision and of long-standing practice. More than half a century of rating stands in the way. Since the *Swansea Case* (1) in 1854 the phrase, "land used as a railway," whether it occurs in the Public Health Act, 1848, or the Public Health Act, 1875, or the Local Government Act, 1858, or in the many private Acts that copy this provision, has never been so restricted.

My Lords, at this distance of time I have no mind to review that case; the only question is how to follow it. It is reported in four different reports: 4 E. & B. 189; 24 L. J. (M.C.) 30; 1 Jur. (N.S.) 326; 3 C. L. R. 18—all of which I have examined. Only the first two of these reports were cited to your Lordships; the second contains a useful plan, but the best report, in my opinion, is that in 3 C. L. R. In the first place, certain sidings and turntables described in the case were held entitled to the benefit of the reduced rate. In the second, as to platforms, an idea seems to have grown up somehow that a station platform was held in that case to be "land used as a railway" only when it is built on the slope of an embankment, which itself carries and supports the rails, and then only to the extent of the longitudinal undivided strip of it, which is vertically over the slope. I think this mistake originates with Pollock B. in the *Llandudno Case* (2), where he clearly conceived the Swansea station in question to have been what he called a "road station" and not a terminus, which the plan in the *Law Journal* report shows that it was. No wonder that his colleague, Wills J., spoke of the decision in the *Swansea Case* (1) as difficult to understand, and the theory, which he supposed it to rest on, as unsatisfactory.

The special case set out in all the four reports raised no question for decision as to any embankments; they are referred to in the arguments of counsel not as part of the facts of the case, but for the purpose of a reductio ad absurdum, and by Erle J. as an analogy, I think a remote one, drawn from the limits of deviation

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30. (2) [1897] 1 Q. B. 287.

in Railway Acts. The test, as stated by Lord Campbell C.J. and concurred in by Wightman and Erle JJ., is this: "So much of the platforms . . . . as are to be considered as on the side of the railway, and of the same breadth as portions of the line at a distance from the station, are properly to be considered as parts of the railway itself; but . . . . the rest of the property to which the case relates, including so much of the platforms as extend beyond the side of the railway, is not entitled to the same exemption" (1); and in assenting to this Erle J. adds: "Where they stand on the line of the railway they would be within the exemption, but where additional land is taken whereon to place them, they would not be so." (2) If these latter words go beyond the former proposition, I do not agree with them.

How this somewhat arbitrary principle was applied to the facts of the case in question does not appear or matter. It raises many questions, but they are questions of fact. It is very indefinite. For example, one asks, "at what distance from the station?" and gets no answer. Subsequent cases have suggested how to make it more precise. Mellor J., purporting to follow the *Swansea Case* (3), in *Midland Ry. Co.* v. *Birmingham Borough Council* (4) says "There is no other limitation than what is necessary for the conduct of the business of the railway," which is certainly too wide, nor do I think that his proposition can be amended, as Vaughan Williams L.J. amended it in the Court below, by reading "business" as "traffic." In the *Llandudno Case* (5) Wills J. states the principle thus: "Whatever is absolutely necessary for the physical use of the railway is to be treated as railway," as are also "those things, whatever they be, without which the railway could not be used as a highway," as distinguished from "those adjuncts to a railway which are necessary for convenient business purposes," propositions which, though useful as guides, need great care in applying them, and might easily be strained beyond anything that the learned judge contemplated. That platforms to some extent are "land used

(1) 3 C. L. R. at p. 23.
(2) 3 C. L. R. at p. 25.
(3) 4 E. & B. 189; 24 L. J. (M.C.) 30.
(4) 13 L. T. (N.S.) 404; 30 J. P. 197.
(5) [1897] 1 Q. B. 287.

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as a railway" has almost become a commonplace since the *Swansea Case* (1), and they are often classed with sidings, and held to be clearly entitled to the reduced rating, as they were there; see, for example, the *Newport Case* (2), the *Birmingham Case* (3), the *Scarborough Case* (4), and the *Llandudno Case* (5), all of which, partly from the scanty reports of the facts, partly, as in the last-named, through omissions from or errors in the reasons given, are of very small assistance in deciding any point now in debate before your Lordships.

My Lords, I think that the principle that land at the side of a railway may be "land used as a railway" when used for a railway platform is sound so far as it goes, and should be acted on. The judgment of the Divisional Court laid down this proposition, "the exemption must be limited to land used as a railway as distinguished from land used for works and conveniences or for the purposes of a railway company which include the business of a carrier." I do not dissent from this, but from the application of it in that judgment to the facts of the present case. Platforms may no doubt be of such a structural character as to fall outside this principle in special cases, or so extensive in area that the purpose of their use is not use as a railway, but as some other kind of convenience in connection with a railway. Platforms which, as Wills J. says in the *Llandudno Case* (5), are used as "lounges," platforms such as form what is called a "concourse" in the new United States termini, or such as are requisite only for the Customs' examination of baggage, or such as only assemble passengers and luggage before descending to a railway on a lower level, as at the "tube" stations in London or at the Quai d'Orsay station of the Chemin de fer d'Orléans in Paris, may very likely require special consideration. The section looks to the conveyance of passengers and goods and not to the whole undertaking, but on this the case stated has a distinct and sufficient finding. The quality of user "as a railway" as applied to a platform raises a question of fact for the sessions, and so does the sufficiency or the excess of

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30.
(2) 2 B. & S. 708; 31 L.J. (M.C.) 266
(3) 13 L. T. (N.S.) 404; 30 J. P. 197.
(4) 33 J. P. 244.
(5) [1897] 1 Q. B. 287

that platform. Both questions here are answered in favour of the railway company. Necessity, though not the test, may well be a matter proof of which is relevant to user "as a railway"; for example, in connection with sufficiency or excess in area. Land which must be used with the railway, if the railway is to be used as a means of conveyance at all, may well be found, when at the side of the railroad, to be used as a railway, and equally so whether the necessity is a physical one or a practical one under the conditions of business prevailing from time to time. I think it makes no difference whether the platforms are of earth, or stone, or wood; whether they are laid flat on the ground or supported on permanent structures necessary for the purpose; whether they are in one straight line, or, as here, on three sides of a parallelogram, following the arrangement of railway lines laid at right angles; whether they are used for men, or beasts, or goods. In the present case, item 5, at both stations, and item 6, at the North Dock station, were, in my humble opinion, in law entitled to the benefit of the exemption.

About the loading ways or roads I think there is more difficulty. They consist of very extensive patches of ground of all shapes and sizes adjacent to sidings and platforms, which would not naturally be called "land used as a railway," though they are at the side of platforms or rails and more or less close to them; they might well be called, indeed, part of the goods station or of the station yard. Their use is to enable the carts of consignors or consignees to bring goods alongside the railway trucks or to take them from alongside; they are necessary for that purpose, and it is found in the special case (Record, p. 45 E) that the transit of each package begins when it is received from the consignor's cart near or alongside the railway truck and ends when the railway truck delivers it to the consignee's cart (albeit sometimes after an intermediate delay). The cart in either case stands alongside the rail or platform or within reach of the crane. Though it is difficult to prescribe a test which will distinguish such loading way from the approaches, for which no claim is now made, and though their area is large and parts of them are sometimes remote from any

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rails, we are dealing with an artificial state of law too old to be lightly disturbed, and I think, on the facts found in this case, that the appellants are entitled to exemption in respect of the loading ways at both stations.

The roofs over the different kinds of platforms, or parts of them, raise a curious contention. It is said that a platform may be none the less "land used as a railway" because it has a roof over it to shelter susceptible passengers or perishable goods from sun, wind, and rain. I agree. But it does not follow that the roof becomes "land used as a railway" because the platforms underneath it may be so described. I daresay the shelter over the platform may often be treated as part of it, but that is not so here. Again, in the *Llandudno Case* (1) a series of roofs was arbitrarily deemed to be split up into longitudinal strips according as they impended vertically over rails, platforms, or cab-drives, and they were treated as benefiting by the exemption or as outside of it according as the subjacent surfaces were exempt or not. This is supposed to be justified by the dicta as to a notional sub-division of the platform in the *Swansea Case* (2); and cujus est solum, ejus est usque ad caelum is suggested as an analogue. Fortunately this never seems to have been established as a practice of rating, and however the exact idiosyncrasies of the roof at Llandudno station may have lent themselves to such a singular view, I feel no difficulty in saying that I think there can be no such rule of general application. There are enough unrealities in rating law already; they should not be added to. The facts about the roofs in the present case, more particularly the description in paragraph 16 (*c*) and (*d*) and paragraph 29 (ix.) of the special case, entirely confirmed as they are by the photographs produced, dispose of the suggestion. These sheds are buildings if anything can be; great areas of rails and platforms are securely housed in; the space within the building is fit for almost any purpose of business or manufacture; the roofs are carried partly on exterior walls, partly on columns; the land that carries them, and in connection with which they are used, is much more the site of these walls and columns than the actual space

(1) [1897] 1 Q. B. 287. (2) 4 E. & B. 189; 24 L. J. (M.C.) 30.

roofed in; quicquid plantatur solo, solo cedit, is a maxim quite as applicable in this case as the other is, and I think it is clear that these roofs cannot, even for the purpose of rating or exemption from rates, be contemplated apart from the building of which they are part, and as part of which alone they have any connection with the land. The land which carries them is not used as a railway, but as the foundation of a huge house.

For the reasons given by Kennedy L.J., which I need not repeat, I think that the hoist house and similar machinery are indistinguishable from turntables, and that as the railway cannot be worked as such without them, the land which bears their weight is land "used as a railway," and not merely as the foundations of machinery which is useful to a railway company in its business. As to the cranes, I think, differing from the Lord Justice, that they play such a part in the receipt or delivery of the goods alongside the waggon as to form, in view of the facts found in the case, part of the appliances which convey the goods by railway upon the transit from consignor to consignee. The remaining item, the sidings and turntables at Great Howard Street, should, in my opinion, be treated as those at North Docks were treated, for the principle of the *Swansea Case* (1) applies to them. It is true that the Great Howard Street Goods Station yard and sidings are on a lower level than the main line, and that communication upwards is established between the two by means of vertical hoists, instead of by hauling trucks up an incline with engines, though they are lowered down it by gravitation; but this is only due to the doubtful structural strength of the incline, which itself is a railway, and I understand the learned recorder to find as a fact (Record, p. 46 B) that this does not prevent the lines of rails therein contained from being parts of the railway. I see no error in law in such finding.

I concur in the motion proposed by my noble and learned friend on the woolsack.

Lord Parmoor. My Lords, this is an appeal from an order of the Court of Appeal varying an order of the Divisional Court

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30.

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whereby an order of the Court of quarter sessions of the peace holden in and for the city of Liverpool was set aside.

Under a proviso of s. 36 of the Liverpool Corporation Act, 1893, an occupier of land used as a railway made under the powers of any Act of Parliament for public conveyance is entitled to be rated in respect of the same to the general rate in no greater proportion than one fourth part of the net annual value thereof. The question for decision is whether certain lands in Liverpool occupied by the appellants are used as a railway made under statutory powers for public conveyance, so as to entitle the occupier to the benefit of differential rating. A subsidiary point was raised that some of the land in respect of which the benefit of differential rating was claimed was not land within the area of compulsory powers of purchase, and that any works constructed thereon had not been made under statutory powers. In my view this objection has no foundation, and I agree with the unanimous decisions both in the Divisional Court and the Court of Appeal.

The lands in question, situate partly at the North Docks Goods Station and partly at the Great Howard Street Goods Station, are sufficiently described and divided into the different parts in two schedules—A and B—which were agreed between the parties and are inserted in the special case. [His Lordship read the schedules.]

In reference to the land comprised in schedule A, the learned recorder found "That the parts of the North Docks Goods Station numbered 1 to 9 are required and used for the purposes of the receipt, conveyance, and delivery of goods to be carried on their railway in the course of their business as a railway company and as common carriers; that the conveyance of goods in waggons upon the company's railway from and to the position in which the same are loaded or unloaded in and from railway waggons could not be conveniently effected without the said parts of the said station, and that the same are not in excess of what is reasonably necessary for the purpose of such traffic as aforesaid."

There was a similar finding in reference to the parts of the Great Howard Street Goods Station numbered 1 to 8 in schedule B.

The question stated by the learned recorder is whether, upon the facts stated, he was wrong in law in holding—

(1.) As to each or any or which of the said parts of the said North Docks Goods Station, numbered 1 to 9 inclusive in schedule A, that the same were rateable at one fourth only of their rateable value.

(2.) As to each or any and which of the said parts of the said Great Howard Street Goods Station, numbered 1 to 8 in schedule B, that the same were rateable at one fourth only of their rateable value.

My Lords, to answer this question of law, stated by the learned recorder, it is necessary to determine the construction which should be placed on the words "land used as a railway made under the powers of an Act of Parliament for public conveyance." It is only the occupier of the area of land which comes within this limitation who can claim to be rated at one fourth only of the net annual value. I assent to the argument adduced on behalf of the respondents that no land can come within the exemption which is not actually part of a railway made for public conveyance. It is not sufficient that land is used for purposes ancillary to, or in connection with, a railway, or the business thereon, however necessary or convenient such use may be for such purposes.

Two propositions have been clearly established and acted on in the practice of railway rating over a long series of years. In the first place the area of land entitled to the rating exemption has not been restricted to the mere line of railway made for the passage of traffic from point to point, whether the line of railway is limited to the actual line of rails, or includes the structural banks, embankments, or cuttings, and the land between the railway fences. In the year 1848, the date of the rating exemption in the first Public Health Act, there was a well-recognized distinction between the term "railway" as applied to a highway to be used on the payment of a toll, and as applied to a railway made for public conveyance, to be used by the public on the payment of the statutory charges. If the Legislature had intended to restrict the exemption to the line of railway there would have been no difficulty in employing appropriate language,

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and thus excluding from the area of exemption all other accommodation, appliances, or machinery. It was admitted by Sir Robert Finlay that an argument carried to this extent would be inconsistent with the case of *South Wales Ry. Co.* v. *Swansea Local Board* (1) and all subsequently decided cases. Apart from the authority of decided cases, such a restriction would in my opinion be quite inconsistent with the language in which the rating exemption has been given either in the public Acts or in the various special Acts founded on the same principle.

In the second place, the area of land entitled to the rating extension has never been extended to include the ordinary station buildings or warehouses which are used as ancillary to or in connection with a railway and as part of the general statutory undertaking, which comes within the statutory powers of a railway company. No argument was addressed to your Lordships on behalf of the appellants claiming such a wide area of exemption. It was recognized that, having regard to the decided cases and the constant practice of railway rating over a long series of years, such a contention would be impossible.

In addition to the use of the term "railway" as limited to the line of railway and the use of the term "railway" as including not merely the railway, but the station and buildings erected in connection therewith, the word in 1848 was used in two other senses, dependent on the context in which it was found. It was used to denote either a railway made for public conveyance on which the railway companies acted as a conveyer of public traffic, or a railway over which the railway company acted as common carriers of the traffic, and made charges, not merely for conveyance, but for the accommodation provided and services performed by them as carriers on and in connection with the railway. In my opinion a railway made for public conveyance does not include as part thereof accommodation, appliances, or machinery which, though necessary or convenient to enable a railway company to perform the duties of a carrier, are yet not reasonably necessary for the conveyance of public traffic. For instance, railway offices

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30.

and buildings at railway stations may be necessary conveniences in connection with the business of a carrier, but they are in no sense part of a railway made for the public conveyance of traffic. In some cases the distinction may present greater difficulties, but the problem has been solved in numerous rating cases, not infrequently by agreement. If accommodation, appliances, or machinery are properly found to be reasonably necessary for public conveyance, the occupier of the land so used is not the less entitled to the rating exemption if the same accommodation, appliances, or machinery are, or may be, largely used in connection with the business of a carrier. This overlapping of purposes for which railway accommodation, appliances, or machinery are, or may be, used is instanced in the finding of the learned recorder in the present case.

The learned recorder finds that the items in respect of which he considered the rating exemption justified, whether in schedule A or schedule B, were required and used by the railway company for the purpose of the receipt, conveyance, and delivery of goods to be carried on their railway in the course of their business as common carriers. If his finding had stopped at this point he would, in my opinion, have applied the wrong test, and the claim of the appellants would have failed. The learned recorder, however, further finds that the conveyance of goods in waggons upon the company's railway from and to the positions in which the same are loaded or unloaded in and from railway waggons could not be conveniently effected without the said parts of the said station, and that the same are not in excess of what is reasonably required for the purpose of such traffic as aforesaid. In my opinion the word "conveniently" is not aptly introduced in the above statement of principle, but the whole matter is before your Lordships' House, and there is no ground for remitting the case for further consideration.

My Lords, the words "a railway made for public conveyance" include as an integral and essential part of such railway all such accommodation, appliances, or machinery as are reasonably necessary to enable the way or line of rails to be used for the conveyance thereon of public traffic. It is the duty of the assessing tribunal to apply this principle in a strict sense,

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and not to include ancillary conveniences, however necessary for business purposes. If a railway is made for the public conveyance of passengers, such platforms or other accommodation and appliances as are reasonably necessary to afford a means of entering or leaving the passenger carriages are part of the actual railway, and not merely ancillary conveniences to be used in connection therewith. The area of land occupied by such platforms is within the rating exemption, and the occupier is entitled to be rated at one fourth of the net annual value. If a railway is made for the public conveyance of cattle or merchandise, such sidings, platforms, loading banks, cattle pens, together with cranes or other fixed machinery, used in connection therewith, as are reasonably necessary in the handling of traffic for public conveyance are part of such railway, and not merely ancillary conveniences to be used in connection therewith. The above enumeration is not intended to be exhaustive, and any accommodation, appliances, or machinery which come within the above principle are part of such railway and within the area of land to be rated at one fourth of the net annual value. In addition, such yard space as is reasonably required to be occupied during the process of loading and unloading is part of a railway made for public conveyance. A distinction is properly drawn between such yard space and the land occupied by a general approach road. The appellants did not press their argument under this head, and the land occupied by a general approach road should be rated at its full annual value.

There is no reason why the above principle should not be satisfactorily applied in all rating cases. In the present case, I have no hesitation in holding that items 4 to 8 inclusive in schedule A, and 4 to 7 inclusive in schedule B, are part of a railway made for public conveyance, and that, consequently, the occupier of the land on which they stand should be rated at one fourth only of the net annual value. The loading ways or roads are a necessary accommodation for the loading and unloading of traffic, and so, too, are the loading platforms or mounds, unless they are in excess of requirements, but this has been negatived in the finding of the learned recorder. The same considerations apply to the cattle loading platforms, or mounds. Sidings and

turntables, not in excess of requirements, have been constantly held to be part of a railway made for public conveyance; it is hardly possible to draw any distinction between them and the ordinary running line. The fixed machinery under item 8 of schedule A, and under item 7 of schedule B, is necessary for the conveyance of public traffic, and the physical user of the railway by trucks or locomotives. I agree in the conclusion of Joyce J. that these are "actually part of the railway in the very narrowest sense that can be put upon that term." I have already expressed my opinion that the approach roads, No. 9 in schedule A and No. 8 in schedule B, cannot be considered as part of the railway, and should be rated at the full annual net value of the land. The only items which remain for consideration are 1, 2, and 3 in both schedules A and B, the roofs over the area of land occupied by accommodation, appliances, or machinery which are a part of the railway made for public conveyance. It is not argued that a railway ceases to be a railway under the rating exemption because it is covered by a roof or surrounded by buildings to which the principle of the exemption is not applicable. There may be many cases in which a railway is not only covered over, but above which buildings are placed, to be used either for offices or ordinary residential purposes. An ordinary tunnel would be an illustration, where the railway company has purchased the land, and not merely an easement. The structure of the tunnel is, on any construction, part of a railway; but ordinary residences might be built on the land above, subject to be rated at their full annual value, in the same way as all other residences in the district. Therefore, in my opinion, there is no inconsistency in rating the land occupied by the items which are part of the railway at one fourth of the net annual value, whilst at the same time rating the roofs over the same area of land at their full annual value. The practicability of applying this distinction has been recognized in the present case, and separate figures inserted under the heading of net annual value. A similar question was raised in the *Llandudno Case* (1), and decided in favour of the railway company. Wills J., applying

(1) [1897] 1 Q. B. 287.

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the principle that the exemption did not apply to adjuncts convenient for business purposes, but only to those things without which the railway could not be used as a railway, included certain roofs as part of the railway. My Lords, I attach great weight to the authority of Wills J. on a question of railway rating, but it appears to me that a railway is capable of being used for the conveyance of passengers or goods without the convenience of a roof, however great this convenience may be for the comfort of passengers or in the handling of goods traffic. Consequently I come to the conclusion that the three first items in each schedule would more properly be included as station buildings, and cannot be considered part of a railway. In respect of these items the occupier ought to be rated at the full net annual value.

During the hearing various cases were brought to the notice of the House which it is necessary carefully to consider. In the case of *South Wales Ry. Co.* v. *Swansea Local Board* (1) it was decided that the rating exemption extended only to the occupiers of land used as a railway, and not to the occupiers of land used for ancillary accommodation and appliances, however necessary these might be in the working and use of the railway, and connected therewith. This construction is so far not open to question. In its application the Court rejected the view that "railway" was equivalent merely to the line of railway, and included in addition thereto the sidings, the turntables on which the carriages actually go, and so much of the land at the side as is occupied for the necessary support of these, and so much of the platform as is of the same width as the side of the adjacent railway. I do not think that the *Swansea Case* (1) purports to give any exhaustive category of what accommodation, appliances, or machinery may be regarded as part of a railway made for public conveyance as distinct from buildings or stations. Erle J. said: "It has never been judicially determined at what point that which is ancillary begins or ends; but the practice of rating may be referred to on this point, and that practice has treated stations, offices, and warehouses as different from railway."

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30, at p. 35.

In *Newport Dock Co.* v. *Newport Local Board* (1) the main question related to the rating of the Newport Docks, and it was held that the dock, as "land covered with water," was within the exemption and therefore rateable at one fourth only of the net annual value, but that the warehouses and other adjuncts to the dock were rateable at the net annual value. As to the railways concerned, it was argued that they had been constructed as ancillary to the docks, and not for the conveyance of passengers. The Court found against this argument that the railway was not private in character, but open to the public on payment of tolls, and therefore within the language of the exempting section, "a railway constructed for public conveyance," and to be rated on the lower scale, the area of the exemption being decided as in the *Swansea Case.* (2) This case does not carry the matter further than the *Swansea Case* (2), or affect to lay down any general test for discriminating at what point the area of railway ends and the area of ancillary works begins.

In the case of *Midland Ry. Co.* v. *Birmingham Borough Council* (3) a borough improvement Act gave a rating exemption to occupiers of land used only as a railway constructed under the powers of an Act of Parliament for public conveyance. It was held that about ten acres of land occupied by certain sidings and turntables, which were used for loading trucks and carriages with goods, and also as a standing line for laden and unladen carriages, and which were found to be necessary for conducting the traffic of the railway, were rateable at one fourth only of the net annual value. It is clear, when the special facts are examined and the language of the judges considered in reference to them, that the words "conduct of traffic of the railway" are equivalent to "conveyance of traffic of the railway." The case does not appear to support the inclusion within the exempted area of land containing appliances and works not required for the conveyance of traffic, though useful in connection with the business of a carrier, but if it could be so construed it would extend the exemption over too

(1) 2 B. & S. 708. (2) 4 E. & B. 189; 24 L. J. (M.C.) 80.
(3) 13 L. T. (N.S.) 404.

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wide an area. Mellor J. in using the words "necessary for conducting the traffic of the railway," or, in another portion of his judgment, "necessary for the conduct of the business of the railway," purports to be following the decision in the *Swansea Case* (1), which he interprets as holding that the word "railway" is not confined to the actual lines of railway. Shee J. more closely indicates the limitations of his judgment. In dealing with an argument which had been addressed to the Court, that there might be lines of railway in connection with the running lines for passengers used only for the purpose of warehousing the carriages, he says: "If such a case came before us, probably it might be right not to include such in the reduced rating. That is not the case before us, because it is found in the case that these sidings and turntables were necessary for the working of the railway proper."

The next case is *North Eastern Ry. Co.* v. *Scarborough Local Board.* (2) In this case the question was again raised of limiting the rating exemption to the line of railway, but Mr. Manisty, who appeared on behalf of the respondents, and whose great experience in railway rating cases is well known, admitted that the sidings, platforms, and turntables, as being necessary for conducting the traffic of the railway, might be taken as part of the railway, though taking exception to the inclusion of a long strip of land which ran along the railway. The Court decided that these sidings, platforms, and turntables were part of the railway, and that so much of the strip of land as might be found to be necessary to the use of the railway should be included within the rating exemption.

In *London and North Western Ry. Co.* v. *Llandudno Improvement Commissioners* (3), the commissioners made a general improvement rate in which they rated at their full net annual value not only the stations, buildings, including waiting-rooms, offices, coal sheds, stables, and goods sheds belonging to the railway company, as to which there was no dispute, but also the roof, platforms, sidings, and other matters set out in the schedule of the case. Before the hearing of the appeal the commissioners

(1) 4 E. & B. 189; 24 L. J. (M.C.) 30. (2) 33 J. P. 244.
(3) [1897] 1 Q. B. 287.

admitted that signal boxes and appurtenances, engine turntables, and certain sidings and land ought only to be assessed at one fourth of the net annual value. The Court held that the roof covering the railway, the roof covering the platform, the roof covering the sidings, the platform under the roof, and the platform uncovered were included within the exemption area, and that the occupiers of the land so used were entitled to be rated at one fourth of the full annual value.

Wills J. in his judgment states very clearly the restricted nature of the test which he thought should be applied: "If it had been intended to confine the exemption given to 'line of railway' the Legislature would have said so in unmistakable terms. Now 'used as a railway' means, I presume, its physical use as a railway. It does not mean those adjuncts to a railway which are necessary for convenient business purposes, or anything of that kind, but it means those things, whatever they be, without which the railway could not be used as a highway." No doubt the learned judge did within this principle include the roof over land held to be part of the railway, but I am unable to accept this conclusion in the present case.

Two further cases were cited during the argument, but neither of them appear to me to have any bearing on the question under appeal, *Adamson* v. *Edinburgh and Glasgow Ry. Co.* (1) and *Williams* v. *London and North Western Ry. Co.* (2)

In a question of railway rating, great weight should be attached to existing decisions and to the rating practice which has grown up in accordance with them; but in including the items 4 to 8 in schedule A and 4 to 7 in schedule B within the area of exemption, there is nothing inconsistent with the existing decisions or the practice founded thereon, and the words "a railway made for public conveyance" must be construed in their ordinary natural meaning, having regard to the context in which they are found.

In my opinion, the appeal should be allowed with costs here and below, and the cross-appeal should be dismissed and the order of sessions restored in regard to items 4, 5, 6, 7, and 8 in

(1) 2 Macq. 331. (2) [1900] 1 Q. B. 760.

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schedule A, and items 4, 5, 6, and 7 in schedule B, and the case remitted accordingly.

Order of the Court of Appeal reversed and declared, on the facts stated in the special case, that items 4 *to* 8, *inclusive, in schedule A and items* 4 *to* 7, *inclusive, in schedule B are entitled to the exemption and fall to be rated at one-fourth part of the net annual value thereof, but that items* 1, 2, 3, *and* 9 *in schedule A and items* 1, 2, 3, *and* 8 *in schedule B should be rated at their full rateable value. The respondents in the original appeal to pay the costs in the Courts below and also the costs of the original and cross appeals to this House.*

Lords' Journals, May 26, 1914.

Solicitors for appellants: *Woodcock, Ryland & Parker, for A. de C. Parmiter, Manchester.*

Solicitors for respondents: *F. Venn & Co., for E. R. Pickmere, Town Clerk, Liverpool.*

[HOUSE OF LORDS.]

THOMAS WILSON, SONS & CO., LIMITED APPELLANTS;

AND

OWNERS OF CARGO LATELY LADEN ON BOARD THE STEAMSHIP GALILEO. } RESPONDENTS.

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THE GALILEO.

Admiralty—Damage to Cargo—Through Bill of Lading—Transhipment—Unseaworthy Lighter—Negligence—Shipper's Risk—Ship's Expense—Shipowner's Liability.

The plaintiffs shipped a parcel of machinery at New York on board the defendants' steamship under a through bill of lading for carriage to Norrköping in Sweden via Hull. By the bill of lading the goods were "to be delivered in like good order and condition at the port of Hull and to be thence transhipped at ship's expense and shipper's risk to the port of Norrköping." And it was thereby mutually agreed that the carrier should have "liberty to convey goods in craft and/or lighters to and from the steamer at the risk of the owners of the goods" and that he should not be liable "for risk of craft, hulk, or transhipment."

On the arrival of the steamship in Hull the defendants hired a lighter and placed the goods therein whilst waiting to be transhipped in another of the defendants' steamships for conveyance to Norrköping. The lighter was left unattended in a crowded harbour and part of its planking was rotten, and next day it was found sunk with a hole in its side, apparently made by a boat-hook from a neighbouring lighter, with the result that the plaintiffs' goods were damaged:—

Held, that the damage was caused by the negligence of the defendants in placing the goods in an unattended lighter without seeing that it was fit for the purpose, and that the defendants were not exempted from liability by the terms of the bill of lading.

Decision of the Court of Appeal [1914] P. 9 affirmed on different grounds.

APPEAL from an order of the Court of Appeal affirming the judgment of Bargrave Deane J. (1)

The appellants were the owners of the steamship *Galileo*. The respondents were manufacturers and exporters of agricultural machinery.

* *Present:* VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

(1) [1914] P. 9.

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The action was brought by the respondents against the appellants for damages in respect of injury occasioned to certain packages of agricultural machinery shipped by the respondents at New York for carriage to Norrköping in Sweden via Hull under through bills of lading bearing various dates in September, 1911. The bills of lading acknowledged the receipt of the goods "to be delivered in like good order and condition at the port of Hull, (or so near thereto as she may safely get), and to be thence transhipped at ship's expense and shipper's risk to the port of Norrköping (or so near thereto as vessel may safely get)" and there delivered to the respondents or their assigns on payment of the contract freight and charges. And it was thereby mutually agreed that the carrier should have "liberty to convey goods in craft and/or lighters to and from the steamer at the risk of the owners of the goods;" and that he should not be liable "for risk of craft, hulk or transhipment." "Also that the goods are subject to any further clauses in the bills of lading in use by the route beyond Hull, and the liability of each carrier is limited to its own line."

On October 12, 1911, the *Galileo* arrived in the Alexandra Dock at Hull, and on October 13 and 15 the respondents' goods were put on board a lighter which the appellants had hired for the purpose from the Hull Keel and Lighter Company. The intention of the appellants was that the goods should be ultimately transhipped into another of their own steamships for carriage on to Norrköping. The lighter was moored with other lighters in the dock, which was very crowded at the time, and was left unattended. On the night of October 16 the steamship *Cicero* entered the dock and the lighters were disturbed. On the morning of October 17 the lighter with the respondents' goods on board was found sunk 100 yards away from the place where she was moored. The lighter was twenty years old and when she was raised it was found that some of her planking was decayed, although outside it had a thin hard face, and that a jagged hole had been poked through the lighter's port side. The respondents' goods were seriously damaged.

All the shares in the Hull Keel and Lighter Company were held by the appellant company or its directors and the directorate

of the two companies was substantially the same, and a question was raised at the trial as to the ownership of the lighter.

The respondents by their statement of claim alleged that it was the duty of the appellants to use due care and diligence in the carriage and transhipment of the goods and that the appellants impliedly warranted the seaworthiness of the vessels and craft employed in such transhipment and carriage, but that in breach of such duty and in breach of the implied warranty of seaworthiness the appellants negligently placed the goods in an unseaworthy lighter and left her unattended whereby the lighter sank and the goods were damaged.

The appellants by their defence denied that the sinking of the lighter was due to any negligence of theirs or to any cause for which they were responsible, and they relied on the terms of the bill of lading as exempting them from liability.

Bargrave Deane J. found that the lighter was unseaworthy and unfit to stand the knocking about which she got when the *Cicero* came in, and that in the circumstances she ought not to have been left unattended, and he came to the conclusion that the hole in her side must have been made by the thrust of a boat-hook by some lighterman. He further found that the appellants were the real owners of the lighter and were responsible for supplying an unseaworthy lighter and for not having a man in charge of her after the goods had been put on board. But assuming that the appellants were not the true owners of the lighter, in his opinion they ought to have been careful to see that the lighter they engaged was seaworthy and were guilty of negligence if they loaded into an unseaworthy lighter the respondents' goods for transhipment. Upon the construction of the bill of lading he held that the condition "at shipper's risk" did not relieve the carrier from the duty of taking every reasonable precaution to protect the property of the shipper.

This decision was affirmed by the Court of Appeal (Lord Parker of Waddington, Lord Sumner, and Warrington J.), but on different grounds. They found that the appellants were not the owners of the lighter and that the injury to the goods was not caused by any negligence on their part, but they came to the conclusion upon the construction of the bill of lading that the obligations

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of the appellants subsisted when the goods were shipped into the lighter and that the appellants warranted the lighter's seaworthiness. The words "at shipper's risk" did not apply to this fundamental obligation of the shipowner.

Leck, K.C., and *Norman Raeburn*, for the appellants. Upon the construction of the bills of lading the liability of the appellants as carriers ceased on delivery of the goods from the steamship at Hull. The goods at the time of their injury were in the course of transhipment, which by the terms of the bills of lading was at the risk of the shippers. The appellants did not warrant the seaworthiness of the lighter by which the goods were transhipped and were guilty of no negligence in or about the transhipment. [They cited *Lane* v. *Nixon* (1); *The Vortigern* (2); *Allan Brothers* v. *James Brothers.* (3)]

Leslie Scott, K.C. (with him *Adair Roche, K.C.*), for the respondents. Bargrave Deane J. found that the loss was caused by the appellants' negligence.

[He was stopped.]

Leck, K.C., replied.

VISCOUNT HALDANE L.C. My Lords, this case is in large measure one of construction and of fact, and I do not think that any new question of law arises in it. The appellants are owners of the steamship *Galileo*, and the respondents are a shipping company who were consignors of goods to the appellants for carriage from New York to Norrköping in Sweden. The appellants, who are well-known shipowners, and had their headquarters in Hull, entered into a contract which is contained in bills of lading which are in the same form, and I take one of them. The form of the bill of lading is this: "Received, in apparent good order and condition from"—the consignors—"to be transported by the steamship *Galileo* now lying in the port of New York, and bound for Hull,"—such and such goods—"to be delivered in like good order and condition at the port of Hull, (or so near thereto as she may safely get), and to be

(1) (1866) L. R. 1 C. P. 412. (2) [1899] P. 140.
(3) (1897) 3 Com. Cas. 10.

thence transhipped at ship's expense and shipper's risk to the port of Norrköping." That is the contract, and then there are clauses in the body of the bill of lading according to which there is power to convey goods in craft, lighters, and so on, from the steamer at the risk of the owner; and there are clauses making the shipowner not liable for the risk of craft or hulk or transhipment, and there are various other stipulations of that kind protective to the shipowner if he acts in the ordinary way.

My Lords, what happened was this. The *Galileo* got to Hull, and then, apparently, there was no steamer ready immediately to take on the goods which had been consigned, and, accordingly, the appellants took this course. They put the goods out of the *Galileo* into a lighter in the port of Hull, which lighter was in charge of nobody and had a defective part in its side, which was covered over by a thin screen, but which really consisted of rotten timber. The result was that at some time somebody apparently pushing off the lighter with a boat-hook—there is no evidence as to what exactly happened—made a hole in the lighter, and the lighter sank and the cargo was lost; and the question is whether the appellants are liable. Bargrave Deane J. held them liable on one ground; the Court of Appeal held them liable on another; and the question now comes before your Lordships whether that conclusion is a conclusion with which you agree.

My Lords, the main question—the first question—turns upon the consideration of the bill of lading and the words "to be thence transhipped at ship's expense and shipper's risk to the port of Norrköping." As I interpret these words, "thence" refers to from the port of Hull, and the transhipment is the process which commences when the goods are put upon board the ship at the port of Hull which is to take them to Norrköping. That was the view of the Court of Appeal, and it is the view which I take of the contract.

My Lords, if that is so, then the goods were not transhipped when they were put on board the lighter, and they remained in the custody of the shipowner and were the subject of such duties as the shipowner was under. The lighter being in that condition, I do not think that it was a proper or a natural

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incident of the voyage to put the goods into it, and I am of opinion that none of the clauses in the bill of lading protect the shipowner in so doing. I am further of opinion that it is at least very doubtful whether under such circumstances the shipowner is not liable throughout for the seaworthiness both of the ship and of the lighter until transhipment has actually taken place, pending the completion of the voyage. He has chosen to ship the goods from his steamer into a lighter out of the ordinary course, and it may well be that he is liable upon that footing. It is not necessary to decide that point, because, if I am right, what was done was something outside what the shipowner was at liberty to do under the terms of his contract and was a breach of his duty; that is the only reason why I do not enter upon the other point.

My Lords, the conclusion I have arrived at is that, if these views are well founded, the judgment of the Court of Appeal was right, and I accordingly move your Lordships that the appeal be dismissed, and dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the conclusion to which the opinion of the noble and learned Viscount upon the woolsack points, but I desire to rest my own judgment upon one fact, to which I shall presently refer.

This contract was a contract divisible into two parts; it was a slump or through contract at a slump or through rate, for carriage from the other side of the Atlantic to the Baltic Sea. There was a port, namely, Hull, at which the situation of the parties in some respects changed. The obligation of the shipowner was to deliver at Hull; he was also obliged to tranship at Hull into another vessel sailing for the Baltic, and at the Baltic port to deliver to the consignee. The question at what stage transhipment begins may raise serious issues, and upon that for my part I would not desire to commit myself. There is, according to the view presented by the shipowner, an interregnum—some period during which the voyage to Hull is ended and the transhipment to Norway is not begun, or at all events, although begun, is not completed.

My Lords, it may be so, and I by no means express dissent

from the view of the noble Viscount on that subject. But my opinion is rested upon this: that, whatever be the view of the contract, in any view it is not disputed that the duty of transhipment thereunder rested upon the shipowner, and it was admitted in argument at the Bar of this House that the ordinary duty of transhipment should be accompanied by the ordinary duty of avoiding negligence.

My Lords, what I find in fact is this: that the course of transhipment adopted by the appellants was to put these valuable goods—agricultural machinery—into a lighter, and upon the evidence it is demonstrated that they might as well have been put into an eggshell. The lighter was an unseaworthy craft quite unfit to survive the ordinary incidents of the trade. As it appeared, she was liable by the probing of a boat-hook to be penetrated—through and through the hull—and so, being left unattended, to sink. This was what happened.

In principle, my Lords, there is no difference between the case of a man pretending to fulfil his obligation of transhipment by putting goods into an unseaworthy lighter and the case of a man pretending to fulfil his obligation of transhipment by putting the goods into the sea. For all purposes in law and in fact these goods are just the same as if they had been negligently dropped by the shipowner, in the course of what is called transhipment, into the bottom of the dock. That being so, my Lords, I do not think that there was any duty of transhipment performed here in any sense which a Court of law could affirm. Upon that ground I hold that liability attaches to the shipowner.

Lord Moulton. My Lords, this is in my opinion a case where no doubtful question of law arises, but the liability flows directly from the findings of fact. I therefore prefer to base my judgment on these findings of fact rather than to discuss and decide questions of law which are not necessary for the decision of the case. In this instance the defendants are liable on the plain ground of negligence in the performance of a duty which every one admits lay upon them. They claim that they had the right to put these goods into lighters for the purpose of their being transhipped and forwarded to the place of their ultimate

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destination. This may be granted, but it is clear that they must do it with all due care.

Now, my Lords, what are the facts in this case? It is not denied that lighters in this port are frequently left unattended, are pushed about, drift about, strike up against one another, and in fact are left wholly without watching, control or protection during the night and for long periods. If a person is aware of this and chooses to put valuable goods into lighters under these circumstances, it is his bounden duty to see that the lighters into which he puts them can safely stand such handling. But it is not pretended that any care was taken in the selection of the lighter, and the defendants seem to think that they are entirely exonerated from the charge of negligence by the fact that such a course of action is common. The fact that a course of action is common is no answer to the charge of its being negligence. We know that in many trades and occupations there is a habitual standard of care which is far lower than that which is reasonable.

My Lords, in my opinion on the almost uncontested facts of this case the defendants, knowing the rough way in which these lighters are treated, used them as the depository of these valuable goods in professed fulfilment of their duty to provide for their further transhipment, without taking the slightest care to ascertain that the lighter they selected was fit for the purpose. This clearly amounts to negligence and it was the proximate cause of the loss. For these reasons I think that this appeal ought to be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 26, 1914.

Solicitors for appellants: *Botterell & Roche, for J. & T. W. Hearfield & Lambert, Hull.*

Solicitors for respondents: *Waltons & Co., for A. M. Jackson & Co., Hull.*

[HOUSE OF LORDS.]

THE NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN } APPELLANTS;

AND

THE SCOTTISH NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN . . . . . } RESPONDENTS.

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1914
July 14.

Succession—Testament—Construction—Ambiguity in Description of Beneficiary—Extrinsic Evidence.

A Scotsman who had lived all his life in Scotland, by a will made in Scottish form, bequeathed a legacy "to the National Society for the Prevention of Cruelty to Children." The legacy was claimed by the society of that name, and also by the Scottish National Society for the Prevention of Cruelty to Children. All the interests of the testator were Scottish, the legacy was placed in the midst of a series of legacies to Scottish charities, and the Scottish society had recently been brought to the notice of the testator. The National Society for the Prevention of Cruelty to Children had its head office in London and did not actively operate in Scotland, and there was no evidence that it was known to the testator:—

Held, that the latter society was entitled to the legacy.

Decision of the Second Division of the Court of Session in Scotland reversed.

APPEAL from interlocutors of the Lord Ordinary (1) and of the Second Division of the Court of Session in Scotland.

This appeal arose out of the rival claims of the appellants and the respondents to a legacy of 500*l.* bequeathed by the trust disposition and settlement of the late Alexander Hogg Nasmyth, of Middlebank in the county of Fife, to "The National Society for the Prevention of Cruelty to Children." The settlement was executed in February, 1911, and the testator died in June of the

* *Present:* EARL LOREBURN, LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

(1) 1913 S. C. 412. (This report includes the interlocutor of the Second Division on the question of the admissibility of extrinsic evidence, but not the interlocutor upon the construction of the settlement.)

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same year. The clause in the testator's settlement which contained the legacy was in the following terms:—"To the Dunfermline and West of Fife Hospital, One thousand pounds free of legacy or other Government duty and other charges, To the Royal Blind Asylum, Edinburgh, Five hundred pounds free of legacy or other Government duty and other charges, To the Edinburgh Deaf and Dumb Benevolent Society, Five hundred pounds free of legacy or other Government duty and other charges, To the National Society for the Prevention of Cruelty to Children, Five hundred pounds free of legacy or other Government duty and other charges, To the Royal Edinburgh Hospital for Incurables (Longmore Hospital), Five hundred pounds free of legacy or other Government duty and other charges, To the Scottish Society for the Prevention of Cruelty to Animals, Two hundred and fifty pounds free of legacy or other Government duty and other charges, To the Royal Edinburgh Hospital for Sick Children, Five hundred pounds free of legacy or other Government duty and other charges, and to the Edinburgh Royal Infirmary, One thousand pounds free of legacy or other Government duty and other charges."

The appellants originated in 1884 as the London Society for the Prevention of Cruelty to Children. In 1889 they adopted their present title of The National Society for the Prevention of Cruelty to Children, and in 1895 they were incorporated by Royal charter under that name. Their head office was in Leicester Square, London.

The respondents were formed in 1889 under their present name of The Scottish National Society for the Prevention of Cruelty to Children, but in 1895 they became affiliated with the appellants and adopted the designation of The National Society for the Prevention of Cruelty to Children (Scottish Branch). The affiliated societies continued to act together for about ten years, but at the end of that period the respondents reverted to their original designation.

The Lord Ordinary (Lord Hunter) decided the case in the respondents' favour upon the pleadings of the parties without proof, but on reclaiming note the Second Division (the Lord Justice-Clerk, Lord Salvesen, and Lord Guthrie) allowed a proof,

and, after evidence was led and parties were heard, ranked and preferred the respondents to the sum in dispute.

The following facts were proved or admitted:—

The testator was a Scotsman who had lived all his life in Scotland and whose interests and associations were exclusively Scottish. Substantially all his money was invested in Scotland. Except for occasional visits to England for the benefit of his health or for business purposes he had no connection with that country. His trust disposition and settlement was prepared in Edinburgh by a Scottish solicitor, and his trustees were Scottish. The respondent society had a branch at Dunfermline, near which the testator's residence was situated, and in 1909 the testator's attention was directed to a case of cruelty to children which had occurred on his own estate and which had been taken up by the respondent society. The testator's brother, with whom he was on intimate terms, had become a director of this society in 1908, but it was not proved that the testator was aware of this. It did not appear that the testator took any interest in the appellant society. As a matter of fact the operations of the appellant society had never extended to Scotland.

1914. July 13, 14. *Younger, K.C.*, and *C. Church*, for the appellants. The appellants exactly answer the description in this bequest and there is no one else who does, and there is therefore no ambiguity. Evidence of intention is not admissible unless in the absence of such evidence the Court would hold the legacy void for uncertainty, as where the description of the person or thing named is equally applicable to two persons or things: *Charter* v. *Charter*. (1) The Courts below have proceeded upon a misapprehension of the observations of Lord Cairns in that case. The general principle is that "wherever a bequest, whether made to a person or a charity, is perfect and unequivocal in all its parts, no parol evidence is admissible to explain it": per Malins V.-C. in *In re Kilvert's Trusts*. (2) That principle was accepted by James L.J. in the Court of Appeal, although that

(1) (1874) L. R. 7 H. L. 364, at p. 383.

(2) (1871) L. R. 12 Eq. 183, at p. 186 (reversed on appeal L. R. 7 Ch. 170).

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Court differed from the Vice-Chancellor upon the construction of the particular will. The law is stated in the same way by Mr. Jarman in his treatise on Wills, 6th ed., vol. i., pp. 488, 489, and by Lord Penzance in *In the Goods of Peel.*(1) And see *In re Fish.*(2) There is no room for extrinsic evidence when the object of the testator's bounty is accurately described and that description fits only one object. If the testator had the appellant society in his mind when he made this bequest he could have described it in no other way, and it is mere conjecture that he had not. The strongest case in the respondents' favour is *In re Wolverton Mortgaged Estates.*(3) There the description was treated as ambiguous, but it might be objected that the evidence was admitted in order to create the ambiguity.

[LORD PARMOOR. *Higgins* v. *Dawson*(4) shows that you must first find your ambiguity.

LORD DUNEDIN referred to *Logan* v. *Wright*(5) (which he observed was quoted in Bell's Principles, Dickson on Evidence, and McLaren on Wills) and to Wigram on Extrinsic Evidence, § 168.]

Assuming that evidence is admissible in this case, the evidence before the Second Division was insufficient to displace the appellants' claim.

Clyde, K.C. (of the Scottish Bar), and the *Hon. Alexander Shaw*, for the respondents. The appellants' case is based on the proposition that if a testator defines unequivocally the object of his bounty extrinsic evidence is not admissible. The respondents are not prepared to accept that proposition even as regards individuals. But there is an important distinction between the name of a society and the name of an individual. The name of the latter is a mere ticket or label for the purpose of distinguishing him from some one else. But the names taken by societies are usually descriptive of the objects which they pursue, and there does not attach to a descriptive name used for the purpose of designation that amount of sanctity which attaches to the name of an individual. So long as the name of

(1) (1870) L. R. 2 P. & D. 46.
(2) [1894] 2 Ch. 83.
(3) (1877) 7 Ch. D. 197.
(4) [1902] A. C. 1, at p. 10.
(5) (1831) 5 Wils. & Sh. 242.

the society is descriptive it would be dangerous to say that because one society uses the description of its objects to designate itself no other society with the same objects can use similar language to designate itself. The ambiguity which may arise in such a case is not confined to ambiguity arising within the four corners of the settlement. This is illustrated by *Johnstone's Executors* v. *Johnstone* (1) and *Henderson* v. *Henderson*. (2) If a Scotsman speaks of a national society he means the national society for Scotland. To him the one discriminating element between these two societies, namely "Scottish," means nothing in a case of a society which is called national: *Wilson's Executors* v. *Scottish Society for the Conversion of Israel, &c.* (3); *Murdoch* v. *Magistrates, &c., of Glasgow*. (4) Here the testator was a domiciled Scotsman, and all his interests were Scottish, and this bequest appears in the middle of a series of bequests to Scottish charities. Moreover the Scottish society had been prominently brought to the testator's notice shortly before he executed his trust disposition and settlement and the English society did not operate in Scotland. There is here a clear case of ambiguity; and it arises with regard to a descriptive name, to which the rule as to individual names does not apply. Evidence to explain the meaning of the bequest is therefore admissible, and the evidence is sufficient to show that the testator meant the Scottish society as the object of his bounty.

Younger, K.C., in reply, referred to Wigram on Extrinsic Evidence, p. 11, §§ 13 and 14.

Earl Loreburn. My Lords, I greatly regret, and I am sure every one will greatly regret, that there should have been this unfortunate litigation between two most excellent societies, both of whom must command our entire sympathy.

My Lords, in this case a Scotsman living in Scotland left by a Scotch will 500*l.* to the "National Society for the Prevention of Cruelty to Children," using that name to describe the legatees. That is a society with its headquarters in London, which does not appear actively to operate in Scotland. Now there is a "Scottish

(1) (1902) 10 S. L. T. 42.
(2) [1905] 1 I. R. 353.
(3) (1869) 8 Macph. 233.
(4) (1827) 6 Sh. 186.

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National Society for the Prevention of Cruelty to Children" also in existence, and it claims that under the circumstances it is entitled to this bequest. The Courts in Scotland have said, We will examine—and they did examine—the circumstances of the testator, and the evidence in regard to his presumed intention, and they came to the conclusion that the testator did really intend to benefit, not the society which he had by name designated, but the Scottish National Society for the Prevention of Cruelty to Children.

My Lords, I regret, as I always must do in differing from the Court of Session, that I am unable to come to that conclusion. When Mr. Younger opened his argument he laid down as a general proposition that when once a persona is accurately named in a will, then the rigid rule descends which forbids under any circumstances any further inquiry or consideration in regard to the person who is to take the benefit. My Lords, I am not prepared to affirm so wide a statement. I do not enter upon it now; if I did so the discussion would be academic, and it is not necessary for the decision of this case. I will only take leave to observe that an extreme danger is apt to lurk in general rules like that. Some unforeseen circumstances may arise. No one can prophesy all the events of the future, and the Court may find itself confronted by a rule which, applied in unexpected conditions, might lead to something quite shocking to its sense of justice. After that had happened a series of corollaries upon that rule might find their way into the *Law Reports* until in the end the Courts would rebel against its further application. Quite recently a venerable rule of equity—or supposed rule of equity—which had been long undermined was finally and of necessity exploded by a decision of this House.

My Lords, I think the true ground upon which to base a decision in this case is that the accurate use of a name in a will creates a strong presumption against any rival who is not the possessor of the name mentioned in the will. It is a very strong presumption and one which cannot be overcome except in exceptional circumstances. I use as a convenient method of expressing one's thought the term "presumption." What I mean is that what a man has said ought to be acted upon unless it is

clearly proved that he meant something different from what he said. Mr. Shaw, in an argument from which I derived profit as well as pleasure, said that you have first to establish an ambiguity and that then the scales would be even. He said you do establish an ambiguity here. In that way he proposed to displace the presumption.

My Lords, I do not think that in this case any ambiguity has been established. The position is that the name of a certain society has been used, and it is necessary for those who question the right of that society to displace that. Counsel for the respondents sought to do so by saying that the name of a society is not necessarily to be treated in the same way as that of an individual, and the presumption is not so strong that the society was intended, as in the case of an individual. It is a circumstance perhaps to be considered, but I confess I do not see that there is much difference between the two.

It was then urged that in the mouth of a Scotsman the use of the term "National Society" would of itself mean the Scottish society; but it must be remembered that the testator here used this term, not as expressive of his own thoughts, but as part of a title or name. It was then urged that the other charitable bequests in the will were given to Scottish charities. I do not see what conclusion is to be derived from that. Perhaps that is a reason for thinking that in this part of the will England should participate. It was said that being a Scotsman he probably meant to benefit Scotsmen. I should think that very likely; but I do not know why he would not also wish to benefit others of his countrymen living in the southern part of the island. We were told that all his interests and his residence were to be found in Scotland, and that he actually knew of a case and had had brought to his notice a case in which the Scottish National Society had intervened. All this does not show that when he said one thing he meant another.

My Lords, I think that concludes the evidence by which it is sought to strike out from a will the name of the society designated in that will to receive the bounty of the testator and to substitute the name of another society. With the utmost respect to their Lordships of the Court of Session, I am quite

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unable to accept that view, and I think this appeal ought to be allowed.

LORD DUNEDIN. My Lords, I candidly regret that I do not see my way to differ from the opinion that has just been expressed because I cannot help having the moral feeling that this money is probably going to the society to which, if we could have asked him, the testator would not have sent it. But that is not the question for a Court of law; the question for a Court of law is, taking the will as it stands, who is the beneficiary—what is the meaning of the words used? On the one hand we have a perfectly full and perfectly accurate description of an existing society, the existence of which the testator may quite well have known, although upon that matter our minds must necessarily be a blank. On the other hand we have a description which if taken as the description of another society is not fully accurate.

Now, my Lords, I think that the argument, as is really almost now conceded, of the appellants' learned counsel in this matter went too far. He would have it that, so long as you had an accurate description of one person and that accurate description did not exactly fit in its terms another person, no ambiguity could arise. I do not think that is the law. I think that the test whether an ambiguity does arise would be quite fairly put in what I ventured to put at a very early stage of the argument, namely, would the description standing as it does, supposing there had been no competitor who had the exact name, have fitted the second competitor? If that is so I think the question of ambiguity arises; but then that question of ambiguity has to be solved. The effect of a question of ambiguity arising is this: that it allows of an inquiry not into intention, but into any such facts and circumstances as may help to give you a key to the meaning of the words which the testator used.

Now, my Lords, we have gone into that inquiry. I do not myself put it so much as my noble and learned friend who has just spoken has done, as a presumption, but I put it thus: that here you have an accurate description of the one person and a description which is admittedly not quite accurate of the other.

You must, I think, have positive evidence of some cogent sort to make you prefer the latter to the former. Such evidence unfortunately in this case I do not find. I do not think there is anything here in the very meagre facts which are before us which can make me prefer a description which is admittedly short of perfect accuracy to one which suffers under no such defect; and I therefore concur in the motion which my noble and learned friend proposes to make.

Lord Atkinson. My Lords, I concur with my noble and learned friend on the woolsack. I think that in this case the testator has used the name of a certain well-known society. In the name itself there is nothing ambiguous or difficult to construe, and prima facie, of course, those words in which he describes it should receive their ordinary meaning.

Now, my Lords, it is sought to show that he meant some other society, not the society which he so describes, but it appears to me that this one circumstance disposes of the case: that there is no sufficient evidence to show that he intended to benefit any society different from that which he has accurately described. His language is in no way ambiguous; he selects the name and description of this society which it bears, and which no other society bears. I think therefore that there is no just reason for applying principles applicable to a case where an ambiguity is disclosed on the face of the man's will to a will whose terminology is clear and unambiguous.

Lord Shaw of Dunfermline. My Lords, I agree with the judgment pronounced by the noble and learned Earl on the woolsack.

Lord Parmoor. My Lords, I agree with the opinion expressed by the noble and learned Earl on the woolsack. The leading principle in all cases of this character is that the Court has not to make a will, but to interpret the words which the testator has used. On this occasion I can find no ambiguity. The words he used are "The National Society for the Prevention of Cruelty to Children," which are the actual words to be found

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in the charter which was granted to this society a few years ago. It is important to remember that the descriptive words in this case come from the charter and were not selected by the testator. The arguments which we have had addressed to us as to the use of the word "national" are hardly relevant to the present case.

My Lords, so far as the extrinsic facts are concerned I think that most of the evidence is quite irrelevant and inadmissible, but, so far as it is relevant and admissible, it appears to me to be of little or no assistance. I agree with the view put forward by the noble and learned Earl on the woolsack that the accurate use of the name "The National Society for the Prevention of Cruelty to Children" creates a very strong presumption in favour of the institution so named, a presumption which can only be rebutted in some abnormal case of a special character. I think that no evidence has been brought before your Lordships' House which in any way interferes with the principle that the language used by the testator should be given its natural meaning. The language is precise and accurate.

My Lords, I agree with the motion of the noble and learned Earl on the woolsack.

Interlocutors of the Lord Ordinary and the Second Division of the Court of Session in Scotland so far as complained of reversed. The respondents to pay [the costs of the action in the Court of Session and also the costs of the appeal to this House.

Lords' Journals, July 14, 1914.

Agents for appellants: *Church, Rackham & Co., for John Burns, W.S., Edinburgh.*

Agents for respondents: *Lithgow & Pepper, for R. C. Gray & Paton, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

KERR OR LENDRUM (PAUPER) . . . . . APPELLANT; H. L. (SC.)*

AND

1914

AYR STEAM SHIPPING COMPANY, LIMITED . . . . . RESPONDENTS. July 17.

Employer and Workman—Compensation—Accident arising out of and in the Course of the Employment—Seaman—Unexplained Drowning—Evidence—Stated Case—Remit—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A case stated by an arbitrator under the Workmen's Compensation Act may be remitted, where the findings are incomplete, ambiguous, or obscure, for the purpose of curing those defects, but not for the purpose of supplying additional details of the evidence of doubtful relevancy.

The steward of a ship, which was in harbour, was lying in his bunk. He was told by the captain to prepare tea for the crew. He was shortly afterwards missing, and the next day his dead body, dressed in his underclothes only, was found in the sea near the ship. The bulwarks were 3 feet 5 inches above the deck. He was a sober man; he was subject to nausea. Murder and suicide were negatived by the arbitrator:—

Held by Earl Loreburn, Lord Shaw of Dunfermline, and Lord Parmoor, Lord Dunedin and Lord Atkinson dissenting, that there was evidence to support the finding of the arbitrator that the deceased met his death by accident arising out of and in the course of his employment.

Decision of the Second Division of the Court of Session in Scotland, 1913 S. C. 331, reversed.

APPEAL from an order of the Second Division of the Court of Session in Scotland reversing an award of the sheriff-substitute of Ayrshire upon a case stated by him under the Workmen's Compensation Act. (1)

The appellant, who was the widow of Edward Lendrum, who was drowned in the harbour of Larne, and their son, Edward Lendrum, claimed compensation as dependants of the deceased.

The facts admitted or proved before the arbitrator were so far as material as follows: Lendrum was employed by the respondents as a cook and steward on their steamship *Turnberry*. On the

* *Present:* EARL LOREBURN, LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

(1) 1913 S. C. 331.

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morning of Saturday, December 16, 1911, the ship was lying in the harbour of Larne, and was to sail at 6 P.M. on that day. Lendrum served the crew with breakfast in the usual way, and after having served breakfast he had no meal to prepare or serve until shortly before the sailing of the ship. It was customary for him to rest in the afternoons, especially on Saturday afternoons, as his work on Friday evenings was usually heavy and prevented him from obtaining sufficient sleep. He slept in a bunk in a small ill-ventilated room entering directly from the saloon of the ship. The room and the saloon were both on deck, and in going from his room or from the saloon to the deck Lendrum would pass a lavatory, situated at the door leading from the saloon, which lavatory was the one used by him while aboard the ship. The captain of the ship, about 4 o'clock P.M., went to the saloon and told Lendrum, whom he saw lying in his bunk, to prepare and serve tea for the crew before the ship sailed. Lendrum just turned in his bunk and looked at the captain, but made no reply to him, and the captain then returned to his own room. The captain afterwards sent the chief officer to see if Lendrum was getting the crew's tea ready, and the chief officer shortly afterwards reported to the captain that he could not find Lendrum in the ship. The captain and chief officer then (about 5.30 P.M.) went and looked in Lendrum's bunk, and saw that he was not in it. They found some of his clothes on a settee in the saloon, and his purse and watch lying by themselves in the saloon, but away from the clothes. Lendrum's disappearance from the ship was at once reported to the police, and his dead body dressed in his day underclothes was next day found in the sea at a point between the place where the stern of the ship had been on the 16th when Lendrum disappeared and a slip situated a short distance from where the stern of the ship had been. Lendrum was drowned, and his dead body bore no marks of violence to account for his death otherwise. He was a good-tempered, sociable man, and pleasant to deal with, always able to do his work, and never seen by the captain of the ship to be the worse of intoxicating liquor, though he was not a teetotaller; he was subject to attacks of nausea and sickness, and was seen on various previous occasions vomiting over the side of the ship.

In March, 1911, a shortage of 3*l.* 14*s.* 6*d.* was found in the liquor stock under the charge of Lendrum, but, by an arrangement with his employers, this sum was being gradually paid back by him, with the result that after his death it was found that, on balancing accounts between the deceased and his employers, there was a debit balance against him of only 11*s.* 1*d.* Once, when the ship was lying in Ayr Harbour, he was seen hanging over her side by a rope, which was fastened to the ship's taffrail and was round his waist; he was holding on to the rope with both of his hands held above his head, and he was not in the water. He afterwards explained to his son Edward that he was trying to recover a towel which had fallen overboard.

The arbitrator found that Lendrum did not commit suicide. He found further that the son, Edward Lendrum, was in no way dependent on his father's earnings, and that the appellant was the sole dependant of the deceased.

Upon a consideration of these facts the sheriff-substitute drew the inference in fact that between 4.30 and 5.30 P.M. on December 16, 1911, Lendrum left his bunk in the steamship *Turnberry*, went on her deck, and accidentally fell overboard and was drowned, and he held that the accident arose out of and in the course of his employment as a cook and steward on board the ship. He therefore made an award in the appellant's favour.

The question of law for the opinion of the Court was whether on the facts admitted and proved he was justified in holding that the deceased Edward Lendrum met his death as aforesaid by accident arising out of and in the course of his said employment.

The Second Division, after hearing counsel upon the stated case, remitted it to the sheriff-substitute to answer certain questions, the nature of which sufficiently appears from the answers of the sheriff-substitute thereto.

The sheriff-substitute reported as follows: "In terms of the foregoing remit, I have respectfully to report to your Lordships (1.) that on the last occasion when Captain M'Donald saw the deceased Edward Lendrum alive, and lying in his bunk, he (Lendrum) had his waistcoat on, but the captain could not say whether Lendrum had on his trousers or not,

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as the lower part of his body was covered with the bedclothes, nor was the captain able to say whether or not Lendrum had his coat on; (2.) that after Lendrum was missed, there were found in the dining saloon of the *Turnberry*, on a settee, Lendrum's jacket, waistcoat, trousers, cap, necktie, collar, boots, purse (containing a few coppers), and watch, the purse and watch not being in the pockets of the clothing, but that there was no underclothing, and that none of the above enumerated articles of clothing were observed in the dining saloon by Captain M'Donald when he went previously to wake Lendrum; the clothes, when found, were not folded up, just thrown off; (3.) that it was not proved that six empty whisky bottles, of another kind than those supplied by the ship, were found under the deceased's mattress, nor was it proved that the deceased's bunk had been overhauled eight days before his death, and that there were no whisky bottles there then; (4.) that it was not proved that there was a shortage of 18*s.* 3*d.* in the stock of liquor controlled by Lendrum referable to the eight days, December 8 to 16, during which the *Turnberry* had been running after her overhaul, but that it was proved by the admission of the defender's cashier that, on an accounting, only the sum of 11*s.* 1*d.* was due to the company by Lendrum at the date of his death; (5.) and (6.) that the height and construction of the bulwarks of the *Turnberry* are shown on a plan produced by the pursuers at the proof on May 15, 1912, the accuracy of which plan was admitted by the agents of the parties, and that it was proved that Lendrum was five feet six inches in height. The said plan accompanies this report, and shows the half rounds where Lendrum was seen vomiting on two occasions previous to his death." The plan showed that the bulwarks were three feet five inches above the deck.

The Second Division (Lord Dundas, Lord Salvesen, and the Lord Justice-Clerk, Lord Guthrie dissenting) ultimately answered the question of law in the negative and recalled the award of the sheriff-substitute.

The appellant's case contained a statement of certain facts which were not included in the stated case, but which it was alleged were proved by the evidence before the arbitrator, but

upon a preliminary objection being raised at the Bar of the House by counsel for the respondents their Lordships intimated that they would not look at the added material.

Clement Edwards and *W. T. Wetenhall*, for the appellant. The arbitrator having found the facts in the appellant's favour and there being evidence upon which he could so find, his award ought to be upheld. [They referred to *Marshall* v. *Owners of S.S. Wild Rose* (1) and *Owners of S.S. Swansea Vale* v. *Rice*. (2)]

R. S. Horne, K.C. (of the Scottish Bar), and *Alec Neilson*, for the respondents. There are here no data to support the findings of the arbitrator. His conclusions cannot be dignified by the name of an inference; they are nothing more than surmise, conjecture, or guess. The difference between inference and guess is well illustrated by Fletcher Moulton L.J.'s judgment in *Hawkins* v. *Powells Tillery Steam Coal Co.* (3) (in which case the award of the arbitrator was set aside for want of evidence), because the Lord Justice there says that if he were allowed to conjecture he would have come to the conclusion that the death resulted from the employment.

[LORD DUNEDIN. In that case there was no evidence to connect the angina pectoris with the work, and that was the ground of distinction between that case and *Clover, Clayton & Co.* v. *Hughes*. (4)]

So here there was nothing to connect the man's death with his employment. There is no evidence that he went to prepare the tea, and the fact that he is found in his underclothing alone is opposed to that suggestion. The theory that he was attacked by sickness is mere surmise. It has not been shown that there was any incident in the man's employment which took him to the side of the ship, nor has any explanation been offered of how he got over a bulwark 3 feet 5 inches high. It has not been suggested that falling overboard is a risk reasonably incidental to a steward's employment when the ship is in harbour. *Marshall* v. *Owners of S.S. Wild Rose* (1)

(1) [1910] A. C. 486.
(2) [1912] A. C. 238.
(3) [1911] 1 K. B. 988.
(4) [1910] A. C. 242.

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and *Bender* v. *Owners of S.S. Zent* (1) are precisely in point. Those authorities show that the mere fact that an accident to a seaman on board ship necessarily arises in the course of his employment does not relieve him from the onus of proving that it also arises out of his employment, and where the facts are equally consistent with the view that the accident arose out of the employment and with the contrary view that onus is not discharged: *McDonald* v. *Owners of S.S. Banana* (2); *Burwash* v. *Leyland & Co.* (3) *Owners of S.S. Swansea Vale* v. *Rice* (4) is distinguishable from this case because there the ship was on the high seas and the man was known to be on duty and known to be suffering from giddiness at the time. *Mackinnon* v. *Miller* (5) is also distinguishable in its facts.

Clement Edwards replied.

EARL LOREBURN. My Lords, in this case the arbiter found that the applicant came within the statute and awarded compensation accordingly. The Court of Session set aside the award, and the question before your Lordships is simply this: Was the conclusion of the arbiter such as a reasonable man could reach? In the case of *Mackinnon* v. *Miller* (5) Lord Dunedin laid down that principle and it is now quite ascertained. Any of us may think that we can see the truth better than the arbiter. Perhaps we may be right, perhaps we may be wrong. It is, however, no business of ours. We have no jurisdiction to decide the question of fact as we think right. Our jurisdiction is confined to the more modest duty already described.

The deceased was steward on a ship lying in harbour. He was lying in his bunk. The captain told him to get tea ready for the men. The next thing known is that he disappeared and was found some time later drowned in the sea. He was sober. He was subject to nausea. The bulwarks were 3 feet 5 inches above the deck. These are to my mind the material facts found by the arbiter in the case stated.

This class of case has led to much refinement. I do not find

(1) [1909] 2 K. B. 41.
(2) [1908] 2 K. B. 926.
(3) (1912) 5 B. W. C. C. 663.
(4) [1912] A. C. 238.
(5) 1909 S. C. 373; 2 B. W. C. C. 64.

it very profitable to consider whether the arbiter's award proceeded on inference or on some kind of speculation which was described in argument by four words successively, namely, conjecture, probability, guess and surmise. I am not qualified to draw a precise line between the thoughts suggested by those several words. They seem to me to run into one another.

Nor am I impressed by arguments proceeding upon a comparison between the facts of one case and the facts of another. Precedents are valuable and authoritative when they lay down a principle. They are otherwise merely illustrations of the way in which judges look at facts. Judges are like other people, and different judges look at facts differently. Nothing has struck me more than this circumstance. When the question is whether or not an arbiter, as a reasonable man, could arrive at a particular conclusion, I find that in some instances Courts have held that he could not, while some of the judges who took part in the decision have actually agreed in the conclusion. That is my position to-day. I hope I am a reasonable man, but if I had been the arbiter I should, on the facts that he has found, have come to the same conclusion. I think the moral is that we should regard these awards in a very broad way and constantly remember that we are not the tribunal to decide. I shall always be slow to say that no reasonable person could think differently from myself.

This man was in his bed, and a few minutes afterwards he was in the water. Murder is negatived. Suicide is negatived. There is absolutely nothing that points to either. No suggestion was made either of the one or the other, and the arbiter has negatived both. The man was on the ship, a place of some danger if you are careless, in pursuance of his duty. It was not found that he had withdrawn himself from his duty. I really do not know whether he fell overboard because he was trying to vomit over the ship's side. I conclude that he must have fallen over by accident while on board as his duty required. But my opinion is not the point. The point is that the arbiter took that view, and though I could understand his taking a different view, I think there was evidence which justified him in inferring that the man died by accident arising out of his employment. It surely cannot be necessary to show either the particular

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way in which he fell or the particular thing he was doing when he fell. An applicant has to prove his case, but he is not required to demonstrate his case or to exclude by evidence every possibility that may be suggested.

Accordingly I think this appeal should be allowed.

I desire to add a few words about the remit. Where a case is stated incompletely or ambiguously a Court may remit for further information. But I think that here the remit went beyond that. Among other things it asked some questions which must have been suggested at the Bar from perusal of the evidence, the answers to which would not affect the question whether or not there was sufficient evidence to support the award. A remit is not intended to assist the Court in substituting itself for the arbiter.

LORD ATKINSON. My Lords, I regret that with every disposition to come to the same conclusion as my noble and learned friends I have been unable to do so. I concur, however, on the question of remit. I think that cases should be remitted where the findings of the arbitrator are incomplete and ambiguous or obscure. Since the superior Court cannot look at the evidence it is necessary that the findings on important facts should be clear and precise, and if they are neither clear nor precise it is I think the privilege and the duty of the Court before which the case comes to remit it to the arbitrator in order that he may make complete what was incomplete, and plain what was obscure. I concur, however, that in this case the remit was directed to matters that were really not relevant to or did not bear upon the important facts.

My Lords, in this case the widow of Edward Lendrum, deceased, and Edward Lendrum, her son, sued the respondents under the Workmen's Compensation Act of 1906 to recover compensation in respect of the death on December 16, 1911, of the deceased, alleged to be caused by an accident arising out of and in the course of his employment as a steward in a ship of the appellant company's named the *Turnberry*. The arbitrator, the sheriff-substitute, has found in favour of the applicant's claim: (1.) that the deceased met his death by an accident arising out

of his employment and (2.) that he met with this accident in the course of his employment. And the question of law put by the arbitrator in the case stated for the opinion of the Second Division is, to use his own language, whether on the facts admitted and proved he was justified in so finding. By the word "justified" he must on the authorities be held, I think, to have meant whether upon the evidence in the case his findings on these two points were conclusions which as a reasonable man he might have in good faith arrived at. It is not disputed that the employment of the deceased was a continuous employment as distinguished from an intermittent employment. In my view, however, that consideration is wholly immaterial. Whether a workman's employment be continuous or intermittent, those claiming compensation in respect of his death are bound to prove that the death resulted from an injury by accident arising out of and in the course of the workman's employment. That burden of proof is as heavy in the one case as in the other, and it must be discharged by the same means and according to the same rules of evidence in the one case as in the other. It is not, I think, legitimate in the case of a continuous employment any more than it would be in the case of an intermittent employment if suicide and external violence be negatived, as it is said, to assume that an unexplained accident, as it has been styled, arose out of the workman's employment. By an unexplained accident in this connection I mean an accident as to which the evidence does not show how it occurred, or which shows with equal cogency that it may have occurred in two or more distinct and different ways or be the result of two or more distinct and different causes.

My Lords, I think the case of *Wakelin* v. *London and South Western Ry. Co.* (1), which has been so often referred to, decided by Lords Halsbury, Watson, Blackburn, and Fitzgerald, has a bearing upon this case. There the action was brought against the railway company for so negligently and unskilfully driving their train across a certain level crossing, and so neglecting to take precautions in respect of the train at the level crossing, that the train struck and killed the plaintiff's husband, whose dead body was found near the level crossing in a condition which

(1) (1886) 12 App. Cas. 41.

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showed that he was struck by the passing train. The jury found a verdict for the plaintiff. It was necessary for the plaintiff to show that the company were guilty of negligence which caused her husband's death. It was assumed for the purpose of the decision that the company had been guilty of negligence in not whistling as the train approached the level crossing, but it was held that there was no evidence to connect that negligence with the accident, that there was therefore no case to go to the jury, and that the company were not liable. Lord Halsbury at p. 45 of the report is reported to have expressed himself thus: "In this case I am unable to see any evidence of how this unfortunate calamity occurred. One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train?" And Lord Watson, with whose judgment Lord Blackburn expressed his agreement, at p. 49 said: "The evidence appears to me to show that the injuries which caused the death of Henry Wakelin were occasioned by contact with an engine or a train belonging to the respondents, and I am willing to assume, although I am by no means satisfied, that it has also been proved that they were in certain respects negligent. The evidence goes no further. It affords ample materials for conjecturing that the death may possibly have been occasioned by that negligence, but it furnishes no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned."

I feel that I follow a good example in using the language of those noble Lords. I think the principle of that judgment applies to the present case. In this case, as in that, the claimant or the plaintiff or plaintiffs was or were bound to produce evidence furnishing data from which an inference could reasonably be drawn as a matter of fact that the particular fact or circumstance from which liability arose existed. In that case this fact was the existence of negligence causing the injury. In the present case the fact is that the accident arose out of and in the course of the husband's employment. If the evidence be

equally consistent with the accident arising out of and in the course of his employment and not arising out of and in the course of his employment, the burden of proof which lay upon the plaintiff has not been discharged. If there be no evidence to support the affirmative issue rather than the negative, the evidence in truth becomes perfectly neutral. And the conclusions of the arbitrator, however confidently and positively asserted to be findings of fact, are in truth mere guesses or surmises, which, with equal justification and plausibility, might have taken quite an opposite form.

Now I turn to the evidence. This vessel, the *Turnberry*, was on December 16, 1911, lying in the harbour of Larne. There is no evidence as to the state of the weather, or as to where or how the ship was moored, or whether she was motionless or to any extent labouring. A map of the ship was produced and proved, but, beyond such evidence as this map affords, there is no evidence whatever as to the condition of the vessel's deck, whether it was slippery and encumbered, or dry and clean. From the map it appears that the rail of the bulwarks was 3 feet 5 inches above the ship's deck, and it is found that the deceased man was 5 feet 6 inches in stature. The deceased served the crew of the ship with breakfast in the usual way. The crew then rested. The ship was to sail at 6 P.M. on this day, and until shortly before that hour the deceased had no meal to prepare. It was customary for him to rest in the afternoon, especially on the afternoon of Saturday, as he would get little sleep on Friday night, when his work was heavy. From the map it appears that there is a deck-house on this vessel containing a saloon, an ill-ventilated room containing the bunk in which the deceased slept, a pantry off this room, and a lavatory which was the lavatory used by the deceased when on board. The room containing this bunk was entered directly from the saloon, and, in going from it to the saloon, the deceased would pass this lavatory. About 4 o'clock the captain of the ship went to the bunk of the deceased and told him to prepare tea for the crew before the ship sailed. Lendrum turned in his bunk, looked at the captain, but made no reply. The captain then saw that Lendrum had his waistcoat on, but could not tell whether he had his trousers or his coat on.

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Nor did he observe whether any of the clothes of the deceased were in the saloon. The captain some time afterwards sent the chief officer to see if Lendrum was preparing tea for the crew. This officer could not find him, and he and the captain went to search for him at about 5.30 P.M. and failed to find him, but they found on a settee in the saloon Lendrum's jacket, waistcoat, trousers, cap, necktie, collar, boots, purse and watch, the latter two of which were not in his clothes but on the settee beside his clothes. No underclothing was found. The body of the deceased, dressed in his underclothing, was found next day in the sea at a point between where the stern of the ship lay on December 16 and a certain neighbouring slip. It does not appear from the evidence what was the distance between this slip and the berth of the steamer, or whether the harbour was tidal or not, or, if so, what was the set of the tide at any time between the finding of the body and the departure of the ship, or whether the action of the screw or the paddles of the steamer as she started would have had any effect upon the body. It was plain from the evidence that the deceased met his death by drowning. No marks of violence were found upon him. Evidence was given as to a strange occurrence which took place when this ship was apparently lying in the harbour of Ayr. It was to the effect that the deceased was seen hanging over her side by a rope which was fastened to the taffrail at one end and tied round his waist at the other, that he was holding on by the rope with both his hands held over his head, but was not in the water, and that he afterwards explained he did this to recover a towel which fell overboard. No date whatever is given for this occurrence, and no evidence as to whether any towel was seen overboard, or had fallen overboard, or what the man's condition or state of health was when this occurrence took place. The sheriff-substitute finds that he was a good-tempered, sociable man, able to do his work and pleasant to deal with, and, though not a teetotaller, was never by his captain seen to be the worse for intoxicating liquor. He further finds that the deceased on this same night left his bunk, went on deck, and accidentally fell overboard and was drowned, and apparently that he did not commit suicide. If the learned sheriff-substitute meant by this

latter finding that it was not proved that the deceased committed suicide, and that, the presumption being against suicide, he, relying on that presumption, found against suicide, I think he was right; but if he meant that the evidence established affirmatively that the death was brought about by some cause other than suicide, I think he was clearly wrong. I find in several cases that the expression "suicide being negatived" is used in reference to this Act as if the evidence justified the conclusion that it was affirmatively proved that the death was due to some cause other than suicide, and not merely that, the presumption of crime not having been rebutted, the judge was justified in finding against suicide. Stated baldly it is, I think, a most misleading expression. The evidence in this case, in my view, left the accident entirely unexplained, and, apart from this presumption against the commission of the crime of felo de se, was quite as consistent with suicide as with any other cause. An effort was made, however, to show how the deceased came to get into the water. It is stated in the case that he "was subject to attacks of nausea and sickness and was seen on previous occasions vomiting over the side of the ship." In the supplemental reports sent in by the sheriff-substitute in consequence of the remit I find the following passage: "The said plan accompanies this report and shows the half rounds where Lendrum was seen vomiting on two occasions previous to his death." Whether this means that these were the only occasions when he was seen vomiting, or the only occasions on which he was seen vomiting at this particular place, is, like many other matters in this ill-drawn and loosely stated case, left in doubt, but there is no evidence whatever when and under what circumstances this vomiting took place, whether it was at sea or in harbour, in fair weather or in foul, in calm or in stormy water, or what state of health the man was in at the time, or what he had eaten or drunk before the attack. There is not a particle of evidence that he was ill on December 16, 1911, or that he complained of being ill, or that to anybody who saw him he appeared to be ill. Two of the rails comprising the bulwarks are removed at these places called the half-rounds for the purpose apparently of facilitating the mooring of the vessel. It is possible, no doubt,

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that a man might, if he got on his hands and knees, crawl through these spaces, but it is not suggested that when on the two occasions Lendrum was seen vomiting near this place he assumed that attitude. No evidence was given as to whether this vessel was lighted up or not, whether any one was about the deck or not, whether any cry for help was heard or not—everything is left vague and uncertain. No explanation is given or suggested why all the clothes, watch, &c., &c., of the deceased were found in the saloon. No evidence to indicate whether he had commenced making the tea or not, but a conjecture is made that the deceased was attacked with nausea, rushed to the side of the ship to vomit and fell over the bulwarks, only twenty-five inches lower than his own head. The only other suggestion is that he crawled through one of the open spaces I have mentioned. That conjecture, if it be a conjecture, remains the same, though it be styled by the sheriff-substitute an inference of fact.

My Lords, in my view this case comes within the principle of *Wakelin's Case* (1), and is distinguishable from *Owners of S.S. Swansea Vale* v. *Rice* (2), where an officer in a sick and giddy condition is sent to perform duties which would necessitate his being sometimes on the bridge of the ship and sometimes on the deck of the ship. I think it is also distinguishable from the case of *Mackinnon* v. *Miller*. (3) There the deck of the ship was found to be greatly encumbered, the bulwarks were only twenty inches high, the passage along between those bulwarks and the engine-house was very narrow; the deck of the ship was in absolute darkness. The body of the deceased was found dressed in his ordinary sleeping clothes, his working clothes being laid beside his bunk. It would have been necessary for him to have traversed this encumbered deck from the cabin where he slept to a fire-hole forward used as a lavatory, if he wanted to get to it for the purposes of nature, and if he tripped or made a false step the low bulwarks would have been more of a trap than a protection.

My Lords, the rule as to the burden of proof may press hardly on claimants in cases such as this, as it does in cases such as *Wakelin's* (1), but if the law is to be altered to meet them, it should,

(1) 12 App. Cas. 41. (2) [1912] A. C. 238.
(3) 1909 S. C. 373.

I think, be done by legislation. I think the decision appealed from was therefore right and should be upheld, and this appeal dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with my noble and learned friend who has preceded me in reference to the point as to the remit made by the Court of Session in this case. A remit can only, in my opinion, be made with propriety when the material furnished in the statement of the case is such as to raise doubt and difficulty as to its completeness or its clearness. When I examine this remit I find in it two striking paragraphs referring to additional particulars and details of evidence which must have been mentioned at the Bar of the Court of Session; and the remit is made to the learned judge to state as arbitrator whether these statements at the Bar as to little details of the facts were proved.

My Lords, anything of that sort appears to me to be a procedure accompanied with some danger. I admit that it is right, and that, indeed, in some circumstances, it would be the duty of the Court of Session to clear up an ambiguity of the kind mentioned by my noble and learned friend who preceded me. But I look with much disrelish upon any procedure which would go further than that. Because observe, my Lords, to what consequences it would lead. If the employers' counsel makes the statement that certain items of fact ought to have been stated which might affect the mind of the Court, I presume that common justice would dictate that in every case the counsel for the workman might say the same thing, and you would have an interminable series of discussions as to whether the learned judge, charged by the Legislature with the duty of stating a case, had with meticulous completeness stated all the particular facts leading up to his conclusions. I could, my Lords, imagine a procedure of that kind to be productive of inconvenience, sometimes to be accompanied by a distortion of the balance of evidence and never very likely to show confidence in the arbitrator.

In regard to the merits of the case I much regret the difference of opinion in your Lordships' House. I should

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state my main proposition thus, my Lords: that we in this House are not considering whether we would have come to the same conclusion upon the facts stated as that at which the learned arbitrator has arrived. Our duty is a very different, a strikingly different, one. It is to consider whether the arbitrator appointed to be the judge of the facts, and having the advantage of hearing and seeing the witnesses, has come to a conclusion, which conclusion could not have been reached by a reasonable man. My Lords, had I been the arbitrator, had the noble Earl on the woolsack been the arbitrator, had my noble and learned friend on my left (Lord Parmoor) been the arbitrator we should each of us have reached the same conclusion as that reached by the arbitrator in this case. Had my noble and learned friends opposite, either of them, been the arbitrator, they would have reached an opposite conclusion. Let it be freely granted that we are all reasonable men, and I will also freely grant that as such each of us is willing to concede of the others, that the conclusions which we respectively reach on the same facts, although quite opposite conclusions, are such in each case as may have been quite reasonably reached. My Lords, I ask myself what right have we to deny similar treatment, not in this case to each other, but to the arbitrator set up by the Legislature to determine the facts in the first instance? I could conceive of no circumstance more luminously favourable to the proposition that we are not here determining evidence for ourselves, but we are settling the main question, and that alone, whether the arbitrator appointed by the Legislature has reached a conclusion as to which we here, differing among ourselves, are able to affirm that he could not have been a reasonable man in coming to that conclusion. So stated, my Lords, the proposition in favour of supporting this judgment seems to be completely self-destructive.

My Lords, on the facts, I will only say this: that I see no occasion to invoke authority. As we have experienced, authority in these cases is too often a source of much confusion. Because my Lords, when you enter the region of authority in discussing propositions in fact so elementary and so simple as those which occur here, you are extremely apt, as a Court of law, to be led by the

temptation of legal formulæ into what is essentially a usurpation; that is to say into the position of upsetting for a supposed legal reason something which exists and remains from beginning to end in the region of fact.

I look at this case thus. A steward on board ship is lying in his bunk, and is ordered to leave his bunk to make tea for his comrades, and he leaves his bunk; all that is admitted. I infer that he left his bunk because he got an order to do so and obeyed it. My Lords, is that a surmise, or is it a conjecture? I am responsible, I observe, in some of these decisions for raising a distinction between an inference and a conjecture. The distinction is as broad as philosophy itself. It is that an inference rests upon premises of fact and a conjecture does not. Now when you come to the region of inference, my Lords, no one has ever suggested that the inference should be in syllogistic form so that all the points of its premises shall with apt and exact completeness justify the conclusion reached. Whenever you are in the position of saying that what you are determining is what a reasonable man would have done, ex concessis you admit that you are in a region in which from premises, more or less ample, a conclusion may be reached in one direction or another. Accordingly, being out of the syllogistic region and in the work-a-day region of inference from fact, I ask myself, was I wrong to infer that this steward when he obtained the order to go and make tea, he being then in his bunk, left his bunk in obedience to the order?

Next what sort of a man was it who thus left his bunk? In the first place he was a man subject to attacks of nausea and sickness; secondly, he was a man who at this odious call of nature had been in the habit of relieving his sickness by going to the ship's side. I infer, my Lords, that this sick man, suddenly ordered to leave his close bunk, took refuge at once in the fresh air and just did what he had done, as is proved, frequently before—he went to the side of the ship.

My Lords, it is precisely in those cases where I think the Legislature with great wisdom has said, Let the man who sees and hears things at first hand and has to consider the main issue determine it for himself. He has determined it favourably to

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this proposition with which he concludes, that this man sustained his death by an accident arising out of his employment.

My Lords, I will add now to the narrative which I have given these further facts: that it is conceded in this case, firstly, that insobriety is not proved; it is conceded, secondly, that suicide is not proved, and thirdly, it is conceded that homicide is not proved; and, therefore, insobriety, suicide, and homicide being out of the case, accident remains,—to a seaman, occurring immediately after an order, in circumstances which, if the order was normally conformed to, would place him exactly where he had been before,—his constitution in the few days not having changed from one which was apt to be attacked by nausea and sickness.

My Lords, were it not that my noble and learned friends opposite differ from this, I should say that a fairer case upon the whole for the inference that this unfortunate man met his death by an accident arising out of his employment I could not conceive. There are no judicial differences in these cases greater, strange to say, than the differences between judges as to whether a reasonable man could have come to a certain conclusion; and I again repeat that if the arbitrator appointed by the Legislature has come to that conclusion, and if even among ourselves we differ with regard to it, how can we charge as against him, appointed by the Legislature, that his conclusion was so unreasonable that no Court of law can support it?

My Lords, it appears to me that to do so would be a usurpation upon the part of a Court of law. I have used, in more than one of these cases before, the expression that Courts of law must take care that they do not usurp a function consigned to another quarter. I think it would be usurpation, because it is making a Court of law enter the arbitrament of fact, and in that arbitrament I think the arbitrator is the final judge, unless the conclusion which he reaches can be declared to be so unreasonable as necessarily to involve its being upset.

My Lords, I say no further on this case, except that I view with satisfaction the judgment of Lord Guthrie, who appears, although he differs from myself in regard to the facts, to have taken what I humbly regard as the correct judicial view of this subject when he says that it was not for him to form a conclusion himself, but

he says: "It appears to me that we"—that is the Division of the Court—"are not asked to draw any inference. What we are asked to do is to consider whether a certain inference could be reasonably drawn." I think, my Lords, that states the proposition with complete accuracy, and I cannot take upon myself the responsibility of saying that this arbitrator did not reasonably reach the inference to which he came.

LORD PARMOOR. My Lords, on the general question I agree with the noble Earl, but I desire to add a few words since I am differing from the carefully prepared judgments of a majority of the judges in the Court of Session.

I cannot, however, say that the case appears to me to be one of any serious difficulty or that it requires a close analysis of the differing conceptions involved in inference and conjecture. I have found no assistance by reference to cases which depend on different circumstances.

The only question of law which arises on the appeal is the competency of the arbiter to make the award which he has made in favour of the appellant. He is competent to make the award unless there are no relevant facts found by him which would support his conclusion, or the relevant facts found by him are of such a character that it is not possible in reason to come to the same conclusion. No question as to the weight of the evidence adduced before the arbiter, and on which his findings of fact are based, comes, or can come, before your Lordships. This House is not concerned with the weight of evidence before the arbiter in any way, and I cannot think that in this respect this House can go behind the findings as stated in the special case. I agree with the protest made by counsel for the respondents against printing in the appendix the evidence taken before the arbiter, but no reference was attempted to be made to it in the course of the argument. The point of law to be determined depends upon the special circumstances of the particular case. I agree with what was said in this respect by Lord Dunedin in the case of *Mackinnon*. (1) "It seems to me" (these are the words of his Lordship) "that each case must be dealt with and decided upon

(1) 1909 S. C. 373; 2 B. W. C. C. 64.

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its own circumstances, and that inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony."

In this case the appellant was the wife of Lendrum, who was cook and steward of the steamship *Turnberry* at the time when he was drowned. The first question for the determination of the arbiter is whether the drowning was an accident as distinguished from violence or suicide. I cannot doubt that there are relevant facts on which it is competent for the arbiter to come to the conclusion that the death of Lendrum was due to accident. It is not challenged that the accident occurred in the course of Lendrum's employment, and the real objection as stated in the able argument on behalf of the respondents is that there is no evidence, or at least that there is no relevant evidence, on which it is possible for the arbiter to come to the conclusion that the death of Lendrum was due to an accident arising out of his employment and that his decision is founded on mere conjecture. I cannot assent to this argument, and I agree with the judgment of Lord Guthrie.

It is not necessary after the full analysis by Lord Guthrie to restate the facts found by the arbiter on which he bases his decision; but there are special factors which appear to me conclusive in favour of the case for the appellant.

Lendrum was drowned while employed on a vessel, and his death therefore resulted from an accident which might naturally arise out of his employment. This consideration appears to me to answer the somewhat extravagant general propositions which it was said might result from upholding the claim of the appellant, and to bring the case within much narrower lines. It was further proved that shortly before the accident Lendrum was ordered by his captain to prepare and serve tea for the crew, and it was quite within the competency of the arbiter to infer that he left his bunk for the purpose of fulfilling this duty. It was also proved that he had never been seen by the captain of the ship to be the worse for intoxicating liquor, but was subject to attacks of nausea and sickness, and was seen on some occasions vomiting over the side of the ship. I can see nothing impossible in a reasonable person drawing the inference that the accident

happened during a vomiting fit while Lendrum was carrying out the orders of his captain. There are other factors which point in the same direction, but I do not propose to carry the analysis further. In my opinion it is not necessary to do so, so soon as the conclusion is formed that the finding of the arbiter is not impossible on the recognized test.

My Lords, I wish to express no opinion either way on the reasonableness of the finding in itself as long as it is a possible finding for a reasonable man. This consideration is not only, in my opinion, quite irrelevant, but to enter upon it in any form opens a door which should be kept shut.

My Lords, I am of opinion the appeal should be allowed.

LORD DUNEDIN. My Lords, while I agree with what has been said by the noble Earl on the woolsack and by my noble and learned friend beside me as to the principles on which remits should be made, I confess I am just a little apprehensive that the remarks made by your Lordships to-day may be taken as going rather further than they were intended to go. Your Lordships will pardon me for saying that I am really here now rather speaking from my experience in the Court of Session, and knowing how impossible it would be to do justice to many of these cases without having remits. And I think it not out of place to remind your Lordships that this remit did not spring from any idea of the judges in this case, but is exactly in terms of s. 17, sub-s. (*g*), of the Act of Sederunt, which is equivalent to what your Lordships are familiar with as rules of Court in England, and as to which power is given by statute to the Court to make them, and which dealing with these cases says "They"—that is the Court—"may always before giving their determination send back the case to the sheriff for amendment." That is the real basis of a remit. The Court has got to deal with the case stated, and if the case is in itself incomplete, the Court has the right to have it made complete. Certainly the only facts which the Court is entitled to ask the sheriff to give are facts which are relevant to the discussion before it, and the discussion before it is limited to a question of law, and therefore the only facts are facts which are necessary to raise the question of law,

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including in it, of course, the question whether there has been any evidence. I may say, my Lords, that there was certainly an attempt made in one quarter at one time to stop the Court of Session in this matter by refusing to state facts. That was dealt with in the case of *Enman* v. *Dalziel* (1) in the year 1912, in which I said at the time, and I have no cause to go back upon what I said, "it has been conclusively settled by decisions of the House of Lords and of this Court, that, although such appeals are by statute limited to questions of law, nevertheless they are competent when the question is whether such findings as these can be supported upon the evidence submitted, for that has been held to be a question of law. The criterion is whether any one could reasonably have come to that conclusion. It has been said more than once that this criterion is, if not exactly the same, at least strictly analogous to the criterion we are in use to apply where we are asked to direct a new trial on the ground that the verdict of a jury is contrary to evidence. It is not a question of whether the decision is right or wrong, but a question of whether there was evidence led upon which the decision can be supported. I think as soon as that position is laid down, it is quite impossible for us to direct our minds intelligently to the question unless we have before us a stated case which will give us a description of what the evidence that was led was."

Now, my Lords, I admit that when I look at this particular remit I find certain facts in it which I consider of more than doubtful relevancy. At the same time the first two of the facts are facts upon which I think it was quite proper for the Court of Session to have the finding of the sheriff, because they bore directly on the fact whether there was evidence upon which he could go or not, and I should have rather hesitated to express myself as strongly as some of your Lordships have done, because although I admit that I do not myself see the relevancy of other facts, yet we do not know the precise reasons that made the learned judges give the remit upon that point; and I hesitate to condemn them unheard. And in particular I would say this: first, that I do not see how it is possible that the learned judges

(1) 1912 S. C. 966.

should discover that the case is incomplete except upon the statements of counsel who are before them; and, secondly, that so far as I know by experience the motions for amendment of a case come just as often from one side as they do from the other.

Now, my Lords, having said so much upon the remit, I do not propose to trouble your Lordships with any views of mine upon the general question. I had to consider the matter in the case of *Mackinnon* v. *Miller* (1), a case which I apprehend none of your Lordships disagree with, and I refer to my judgment in that case. The conclusion that I came to of the criterion, as it is not long, I shall here repeat. I said in that case, and I repeat it in this. "It seems to me that each case must be dealt with and decided upon its own circumstances and that inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony." And then in that case I went on to say: "Here the learned sheriff-substitute cannot be said to have drawn an inference which no reasonable man could draw, and, that being so, it is not for your Lordships to interfere with his decision." Now, my Lords, that criterion commends itself to all your Lordships because you have really expressed the same thing in other and, I doubt not, in better words.

My Lords, I am bound to say that if the matter was open to me I should agree, in fact I do agree, with the views of my noble and learned friend beside me (Lord Atkinson), and if I may say so I feel still more certain of this: that if I had been sitting in the Second Division I should have come to the same conclusion as they did, and I should have come to that conclusion not so much upon what I thought myself, but because I should have thought I was loyally carrying out the views of this House as expressed in *Marshall* v. *Owners of S.S. Wild Rose* (2), and more particularly would I have thought I should have carried out the views of my noble and learned friend opposite (Lord Shaw) as expressed in that case, although I agree that his argument in one sense cannot be controverted. I quite agree that taking the criterion as I have set it down I admit myself out of Court when three of your Lordships say that you would have come to the

(1) 1909 S. C. 373; 2 B. W. C. C. 64. (2) [1910] A. C. 486.

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same conclusion as the arbitrator. I can only say that I look in vain for any evidence in this case. It all turns upon one point, whether there is any evidence which, so to speak, associates this man's duty with his being at the side of the ship. I can find none. I say no more because my noble and learned friend beside me (Lord Atkinson) has dealt at length with that matter. I should not even have dissented were it not for this: that although the opinion of my noble and learned friend beside me and myself cannot influence the decision of your Lordships, at least I hope it may serve as a hint to some arbitrators that they really must go upon facts and not confine themselves to guesses.

Interlocutor of the Second Division of the Court of Session in Scotland reversed and award of the sheriff-substitute of Ayrshire restored. The respondents to pay the costs in the Court of Session and also the costs of the appeal to this House, the costs in this House to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, July 17, 1914.

Solicitors for appellant: *Alexander Smith, for J. & A. B. Boyd, Ayr.*

Solicitors for respondents: *Botterell & Roche, for Maclay, Murray & Spens, Glasgow.*

[HOUSE OF LORDS.]

COMMISSIONERS OF INLAND REVENUE . APPELLANTS; AND MARQUESS CAMDEN . . . . . RESPONDENT.

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1914
July 22.

Revenue—Reversion Duty—Determination of Lease—"Benefit accruing to the lessor"—Basis of Ascertainment—Building Agreement—Expenditure on Building by Lessee—"Payments made in consideration of lease"—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 13.

Sect. 13 of the Finance (1909-10) Act, 1910, provides by sub-s. 1 that on the determination of any lease of land reversion duty shall be paid on the value of "the benefit accruing to the lessor," and by sub-s. 2 that the value of the benefit accruing to the lessor shall be deemed to be the amount by which the total value of the land at the time the lease determines exceeds the total value of the land at the time of the original grant of the lease, "to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property)."

In 1891 a builder agreed to take a lease of a freehold block of houses, for forty years, at a yearly rent of 125*l.*, and to carry out certain specified building works on the property, the lease to be granted on the completion of the works. The works were completed at a cost of 6000*l.* and the lease was granted in consideration of the expense incurred by the lessee in carrying out the works and of the rent and covenants thereby reserved. On the determination of the lease by surrender in 1910 a claim against the lessor for reversion duty arose under the Act:—

Held, that, in ascertaining for the purposes of reversion duty the total value of the land at the time of the original grant of the lease, the 6000*l.* expended by the lessee on the building works was a payment made in consideration of the lease within the meaning of the section and ought to be taken into account.

Whether the entire 6000*l.* ought to be added to the capitalized rent *quaere*.

Decision of the Court of Appeal [1914] 1 K. B. 641 affirmed.

APPEAL from an order of the Court of Appeal reversing an order of Horridge J. (1)

* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

(1) [1914] 1 K. B. 641.

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The question raised by this appeal was whether, in ascertaining the total value of land comprised in a lease at the time of the original grant thereof, sums expended by the lessee in pursuance of an agreement to execute specified building works upon the land, in part consideration of which the lease was granted, ought to be taken into account for the purpose of assessing the lessor to reversion duty under s. 13 of the Finance (1909-10) Act, 1910 (1), upon the determination of the lease.

In 1889 certain lands and hereditaments in Camden Town, being the lands and hereditaments the subject of the present appeal, were vested in the trustees of the will of the second Marquess Camden, hereinafter called the Camden trustees, during the minority of the present Marquess, the respondent, and the estate of the late Marquess was being administered by the Chancery Division.

By an agreement dated June 6, 1889, made, subject to the approval of the Court, between William Henry Wilson and the Camden trustees, Wilson agreed to take from the trustees a lease of certain land and houses in Camden Street and Archer Street, Camden Town, at the yearly rent of 125*l.*, as to part of the premises for a term of twenty-one years from September 29, 1889, and as to the residue for a term of twenty years from

(1) Finance (1909-10) Act, 1910, s. 13, sub-s. 1: "On the determination of any lease of land there shall be charged, levied, and paid, subject to the provisions of this Part of this Act, on the value of the benefit accruing to the lessor by reason of the determination of the lease a duty, called reversion duty, at the rate of one pound for every complete ten pounds of that value."

Sub-s. 2: "For the purposes of this section the value of the benefit accruing to the lessor shall be deemed to be the amount (if any) by which the total value (as defined for the purpose of the general provisions of this Part of this Act relating to valuation) of the land at the time the lease determines, subject to the deduction of any part of the total value which is attributable to any works executed or expenditure of a capital nature incurred by the lessor during the term of the lease and of all compensation payable by such lessor at the determination of the lease, exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property), ..."

September 29, 1890, and to carry out, to the satisfaction of the trustees' surveyor, the works specified in the schedule thereto, such works to be completed within eighteen months of the approval of the agreement by the Court, the lease to be granted as soon as the said several works had been completed in accordance with the agreement. This agreement was approved by the Court and the works were proceeded with.

In December, 1890, Wilson represented to the trustees that the money already expended by him upon the premises largely exceeded his estimate and that a much larger expenditure was necessary in order to put the premises in a satisfactory condition, and he expressed his willingness to incur this additional expenditure if the trustees would grant him an extension of the term. Accordingly an agreement dated February 17, 1891, subject to the approval of the Court, was entered into between the same parties, whereby Wilson agreed to take from the Camden trustees a lease of the premises comprised in the original agreement at the yearly rent of 125*l.*, as to part of the premises for a term of forty years from September 29, 1889, and as to the residue for a term of thirty-nine years from September 29, 1890, and agreed to carry out to the satisfaction of the trustees' surveyor the works specified in the schedule to that agreement, such works to be completed within eighteen months of the approval of that agreement by the Court, the lease to be granted as soon as the said several works had been completed in accordance with the agreement. This agreement was duly approved by the Court, and the works were carried out at a cost which was agreed by the parties for the purposes of this appeal at 6000*l.*

In pursuance of these agreements six leases of the several parts of the premises comprised therein were on June 28 and November 23, 1892, granted to Wilson at rents amounting in the aggregate to 125*l.* These leases were all in the same form and each of the six leases witnessed "that in consideration of the expense incurred by the lessee in erecting the messuages and buildings hereby demised and of the rent and covenants on the part of the lessee hereinafter reserved and contained" the lessors thereby demised to the lessee the premises in question. Each of the leases also contained a covenant to keep the buildings in repair.

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The respondent attained his majority in 1893 and thereupon became absolutely entitled in fee simple to the premises comprised in the leases.

By an indenture of August 5, 1910, five of these leases were surrendered to the respondent, and by indentures of even date therewith five new leases were granted to Wilson. By an indenture of February 15, 1911, the remaining lease was surrendered and by an indenture of even date therewith a new lease was granted to Wilson.

On January 3, 1912, the appellants served on the respondent six assessments to reversion duty in respect of these premises. The appellants fixed the total value of the premises at the determination of the leases at 11,246*l.* They fixed the total value at the time of the granting of the original leases at 3000*l.*, being the capitalized value of the rents at twenty-four years' purchase. The 3000*l.* was then deducted from the 11,246*l.*, leaving a sum of 8426*l.* as representing the benefit accruing to the lessor, on which the full reversion duty was 823*l.* This sum was then discounted under s. 3, sub-s. 2, of the Revenue Act, 1911, by reason of the surrender of the leases before the expiration of the terms, with the result that the amount claimed for reversion duty was 388*l.* 15*s.* 4*d.* The respondent appealed to a referee against these assessments on the ground (inter alia) that the sum expended by the lessee on building works was part of the consideration for the leases and ought to have been taken into account in ascertaining the total value of the premises at the time of the granting of the original leases.

The referee affirmed the assessments, except that he substituted twenty-five years' purchase for twenty-four years in arriving at the total value of the land at the grant of the leases. Upon an appeal to the High Court Horridge J. found (1.) that the lessee, in pursuance of the first and second agreements, had expended the sum of 6000*l.* on the works therein mentioned before the dates when the original leases were granted; (2.) that the full rental value of the land and buildings at the time of the granting of the original leases was the sum of 811*l.*; and (3.) that the total rent of 125*l.* was considerably below the ground rent of the land alone if such ground rent was secured by both the land and the buildings;

and upon these findings he affirmed the determination of the referee. This decision was reversed by the Court of Appeal (Cozens-Hardy M.R., Swinfen Eady and Phillimore L.JJ.), who held that the 6000*l.* was a payment made in consideration of the leases and ought to be taken into account in ascertaining the total value of the land at the times when the original leases were granted.

A separate point was made by the respondent's case that compensation was payable and paid by the lessor at the determination of the leases within the true intent and meaning of s. 13, sub-s. 2, of the Act, and that the grant of the new leases was such compensation, and there should have been a deduction accordingly from the total value at the end of the leases pursuant to s. 13, sub-s. 2, for the purposes of the calculation directed thereby. This point was concluded in the Courts below against the respondent by the decision of the Court of Appeal in *Inland Revenue Commissioners* v. *Lord Anglesey* (1), but it was agreed at the hearing of this case before the Court of Appeal that the point should be kept alive for decision by this House. The point was also referred to in the appellants' case, but no cross-appeal was presented by the respondent in respect of it.

The House decided in the course of the argument that this point was not open to the respondent.

1914. July 2, 3. *Sir John Simon*, *A.-G.*, and *Sir Stanley Buckmaster*, *S.-G.* (with them *Sheldon*), for the appellants. The object of s. 13, sub-s. 2, in prescribing a special method of arriving at the total value at the commencement of the lease was to avoid a speculative valuation at a date long since passed and to base the calculation upon the contents of the lease itself. Accordingly the Legislature has said that the total value at that date is "to be ascertained on the basis of the rent reserved and payments made in consideration of the lease" except in the special case where a nominal rent only is reserved, when the value of any covenant or undertaking to erect buildings or spend money on the property is to be included. "Payments made in consideration of the lease" include only payments, such as premiums, expressed by the lease

(1) [1913] 3 K. B. 62,

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to be made by the lessee to the lessor or the persons entitled to the reversion. They do not include payments to third parties. A payment by the lessee to a third party is not and cannot be any measure of the value to the lessor. In determining the benefit accruing to the lessor it is not the same thing whether the money is paid into his pocket or is expended in buildings. The sum expended on building might be perfectly extravagant and no test of total value at all. The inclusion of the value of any covenant to build where only a nominal rent is reserved implies that that item is not to be taken into account in other cases, otherwise the words in brackets might as well be cut out. This case does not fall within the words in brackets because a nominal rent does not include everything which is less than a rack rent; it does not apply to a substantial rent which is capable of being capitalized and is not a mere token. It may be that in this particular case the construction of the Crown may produce hardship, but it is the duty of the Courts to construe the language of the statute as it stands, and upon a fair construction of the words of this sub-section money spent on buildings is not a payment made in consideration of the lease, on the basis of which the total value at the commencement of the lease is to be ascertained.

Sir Robert Finlay, K.C., and *W. Allen*, for the respondent. 1. On the words of the statute this sum of 6000*l.* is a payment made in consideration of the lease and must be taken into account; and the whole of the expenditure must be allowed because the statute has adopted a rough and ready mode of ascertaining the total value at the time of the original grant and says that you are to take as that value what the tenant is prepared to pay as the price of getting the lease. It matters not whether the payment is made by way of premium or fine or in erecting buildings. The value of the land is increased by expenditure in buildings, which is as much a measure of the total value as a premium. The fact that the work must be done to the satisfaction of the lessor's surveyor is a safeguard against useless expenditure. It may be objected that the buildings might wear themselves out during the lease, but the covenant to keep in repair prevents that. Moreover the test is what is the value of the land at the time, and the section excludes the

subsequent history of the property. Further, this point is not raised by the appellants' case and it would involve an endless inquiry.

2. The rent reserved by these leases is a nominal rent within the words in brackets. In this connection the expression "nominal rent" means any rent which is substantially less than the rack rent.

Sir John Simon, A.-G., replied.

The House took time for consideration.

July 22. LORD DUNEDIN. My Lords, this question arises upon the construction of the 13th section of the Finance (1909-10) Act, 1910. That section, sub-s. 1, imposes a duty called reversion duty on "the value of the benefit accruing to the lessor by reason of the determination of the lease" at the determination of the lease. It then proceeds in sub-s. 2 to fix rules for the ascertainment of the benefit accruing. Paraphrasing its provisions the benefit is to be found by subtracting the value of the subject at the time of the grant of the lease from the value of the subject at the end of the lease. The value at the end of the lease is to be ascertained in accordance with general rules as to valuation, as set forth in another part of the Act. The value at the time of the grant of the original lease is to be ascertained "on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property)." It is on this latter clause that the present dispute arises; there is no dispute as to the value at the present time.

The facts on which the dispute arises are very simple. The trustees of the Marquess Camden let six tenements to a Mr. Wilson by six leases. The leases bore that they were granted "in consideration of the expense incurred by the lessee in erecting the messuages and buildings hereby demised and of the rent and covenants on the part of the lessee." The appellants under these circumstances made the calculation of value by taking twenty-four years' purchase of the reserved rent, but made no

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addition in respect of the expense incurred by the lessee in erecting the buildings. On appeal to the referee he held that twenty-five years' purchase should be taken instead of twenty-four, but in other respects he upheld the assessment, holding in particular that in ascertaining the total value no consideration is to be given for the payments in consideration of the lease. On appeal to Horridge J., that learned judge found as a fact that prior to the granting of the lease Wilson had in pursuance of his agreement expended the sum of 6000*l.* upon the works mentioned, i.e., the erection of the buildings, and confirmed the judgment of the referee. On appeal to the Court of Appeal that Court held that that sum of 6000*l.* fell to be added to the capitalized sum of the rents at twenty-five years' purchase.

The argument for the Crown against that judgment is succinctly stated in the fifth reason of the appellants' case, which runs thus: "'Payments made in consideration of the lease' include only payments made as premiums, expressed by the lease to be made by the lessee to the lessor, or the persons entitled to receive and give receipts for such payments."

My Lords, I cannot accede to this view. It practically interpolates in the section after the word "payments" some such words as "to the lessor" which are not to be found in the section. What the section does say is "payments in consideration of the lease"; and this lease says that the expenditure (and there cannot be expenditure without payment) is in consideration of the lease. Nor do I think that the ensuing parenthesis causes any difficulty. That parenthesis is to meet the case where the consideration is not expenditure which has taken the form of payment, but is something which as yet exists in obligatione tantum. That is sufficient, in my view, to explain the presence of the parenthesis. But I should wish emphatically to add that when a case does arise under the parenthesis I wish to reserve my opinion and not to be held as necessarily agreeing to findings in this case that this rent is not "nominal." Whether this rent is nominal or not it is immaterial to consider, for, in my view, the case does not fall under the parenthesis at all.

My Lords, in my view this ends this case, and I hold the judgment of the Court of Appeal to be right.

Another question might have been raised as to whether the whole 6000*l.* fell to be added. In my judgment no such case was raised by the Crown and it is too late to raise it now.

I have had the advantage of reading and considering the opinions of my noble and learned friends Lords Atkinson and Parmoor, who are to follow me, and I find that on this matter, had it been possible to raise it, they seem to entertain divergent opinions. In the circumstances I think it best to reserve my opinion altogether until a case arises, if ever, when the question is properly brought before us on the facts.

I move that the appeal be dismissed with costs.

LORD ATKINSON. My Lords, the main, if not the sole, question for decision in this case is the proper construction of that portion of s. 13, sub-s. 2, of the Finance (1909-10) Act, 1910, which deals with the method by which the total value of land at the time a lease of it was originally granted is to be ascertained; and this again resolves itself into the question whether the word "payments," used in the sub-section, includes payments made by the lessee, not to the lessor, but to others for the construction of buildings on the land demised, the erection of which formed a portion of the consideration for the grant of the lease itself.

The object aimed at by this 13th section is to levy a tax on the value of the benefit accruing to the owner, or owners, of the reversion on a lease on the determination of that lease.

The 2nd sub-section prescribes the mode in which the value so taxed by the 1st sub-section shall be ascertained. I think the primary object thus aimed at should, however, be steadily kept in view in construing each provision of the section. It is not accurate to say that the value of this benefit is the difference between the total value of the land at the time the lease determines and the total value of the land at the time the lease was granted.

The total value of the land at the time the lease determines would, under s. 25, practically mean its market value freed from all the rights or obligations ceasing on the determination of the lease, but subject to the rights, obligations, or charges imposed aliunde. In order, however, to ascertain the benefit conferred

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upon the owner or owners of the reversion by the determination of the lease, there must be deducted from this total value, or purchase price, such part of it as is attributable to any works executed, or capital expenditure incurred by the lessor during the term of the lease, and also all compensation payable by the lessor at its determination. It will be observed that these deductions in respect of works executed and capital expended are to be made whether the execution of the works or the expenditure of the capital be voluntary or obligatory. These several matters, personal to the lessor, are to be taken into account to diminish in his behoof that total value which the land would have for others. Now, the value of the benefit which is taxed cannot possibly exceed the total or market value, thus found, of the land. It may, and in most cases must, be less than this, since the benefit is to be diminished by the deduction to be made from it of the total value of the land at the time the original lease was granted.

Such difficulty as exists in the case arises from the looseness of the language used in prescribing the method by which this latter total value is to be ascertained.

It is to be ascertained "on the basis of the rent reserved and payments made in consideration of the lease." Well, it is clear, I think, that this must mean payments made by, or on behalf of, the lessee, otherwise they could scarcely be made "in consideration" of the lease. No time is specified when the payments are to be made, no other indication given as to the person to whom they are to be made.

As far as the rent is concerned it is obvious that the aim of the provision is to get at the total value of the land "on the basis" of what the owner gets for the right conferred by the lease to use, occupy, and enjoy it. The number of years' purchase at which that rent is to be capitalized will, of course, vary according as the rent is high or low, is well or ill secured.

If a premium be paid to the lessor in consideration of the lease, that only differs from the rent in this, that it is an immediate payment of a lump sum instead of an annual payment made during the currency of the lease, and the capitalized value of the rent and the premium are subject precisely to the same

considerations. They are payments made, or taken to have been made, to the lessor in consideration of the granting of the lease, moneys the lessor gets for the use which he gives of the land, the purchase-money in fact of that use, and therefore a measure of the total or market value of the land at that time.

Where the payments made in consideration of the lease are not made to the lessor, but made by the lessee to those who have erected buildings on the land in consideration of which, as well as of the rent, the lease was granted, I quite concur with the Court of Appeal in thinking that they must be taken into consideration in ascertaining this second total value. This outlay presumably makes the rent more secure, and therefore more valuable, and on the termination of the lease, either by effluxion of time or otherwise, the value of the land as it stands may be enhanced by the existence upon it of those buildings; but I think the benefit which the lessor gets in this case is not equivalent to that which he would receive if, the rent being the same, a premium had been paid to him equal in amount to the sum expended in the erection of the buildings.

In the case of the premium the lessee pays this sum together with the rent for the use of the land, in its condition as granted or contracted to be granted, and it may, therefore, furnish a good measure of the then value. In the second case he pays it for the use not merely of the land in that condition, but of the land with the buildings upon it which he himself has erected or will erect. His capital, to the amount of the premium, is finally parted with in the one case; while in the other that which it represents can be enjoyed by him during the term of the lease. The land with the buildings upon it never was, until the termination of the lease, the property of the lessor, freed from the lessee's right to use them; he never could have disposed of it, with the buildings on it, free from that right.

It is not necessary in this case, I think, to decide whether the total value of the land at the time the lease was granted was the capitalized value of the rent plus the precise sum of 6000*l.*, the cost of the buildings, or whether the basis upon which this total value is to be ascertained is the rent reserved plus the value of the buildings subject to the lessee's rights, because the case seems

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to have proceeded upon the assumption that, if the word "payments" was not to be confined to payments made to the lessor, 6000*l.* was the proper sum to be taken into account, just as if had been a premium. I concur with the Court of Appeal in thinking that the word "payments" cannot be confined to payments made to the lessor. I further concur with that Court in thinking that it is not at all necessary that payments are to be excluded, though not mentioned in the lease, if they be in fact made. Here, however, it is distinctly stated that the lease was granted in consideration of buildings which had been made.

I, therefore, am of opinion that the order appealed from was right and should be confirmed, and this appeal dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, the appeal in this case raises a question with reference to the assessment of reversion duty. That duty is dealt with by various sections of the Finance (1909-10) Act, 1910, and the section with which in particular the House is concerned is s. 13.

The material facts are really not in dispute. In the year 1891 the Camden trustees made an agreement with one Wilson whereby Wilson agreed to take from them a lease of certain premises comprised in an original and then current agreement at the yearly rent of 125*l.* for a term of forty years. (I state the arrangement in the most general terms.) By this agreement the lessee undertook to execute certain works to the satisfaction of the trustees' surveyor, and these were specified in a schedule to the agreement. Upon this being done it was stipulated that a lease should be granted. The properties are six in number, but the conditions applicable are the same in each case, and I treat the transaction as one.

The agreement was subject to the approval of the Court, and this approval was duly obtained. The works stipulated for were completed, and the leases, six in number, were granted in 1892. The consideration for the lease was accordingly twofold—first, the rent reserved, and, secondly, the expense incurred in works done. As to this latter, the finding of Horridge J., which was not disputed, is as follows: "Prior to the granting of the leases

I find as a fact that W. H. Wilson had expended in pursuance of his agreements to which I have referred contained in the agreements of June 6, 1889, and February 17, 1891, a sum of 6000*l.* upon the works mentioned."

The facts, my Lords, being so found, it does not appear to me that any real difficulty arises in applying the language of the statute to them. Reversion duty is under the Act paid on the value of the benefit accruing to the lessor by reason of the determination of the lease, and (sub-s. 2) the value of this benefit shall be deemed to be the amount by which the total value at the time the lease determines exceeds the total value at the time of the original grant.

It is recognized by the statute that there may be difficulties in going back to the time of the original grant. The difficulties are of this nature, that it might be impossible to tender any kind of satisfactory proof as to original value apart from these two considerations, namely, the rent reserved and payments made in consideration of the lease.

The contention of the Crown in the present case is compendiously expressed in the fifth reason of the appellants' case, to the following effect: "'Payments made in consideration of the lease' include only payments such as premiums expressed by the lease to be made by the lessee to the lessor or the persons entitled to receive and give receipts for such payments." I am of opinion that the fifth reason referred to is bad.

To apply it to the facts of the case, it would mean that the 6000*l.* expended upon the properties as a part consideration for the lease is to be excluded, because it was not in the nature of a premium or of a sum paid in money to the lessor. The lease, the language of the statute being what I have described, witnesses as follows: "That in consideration of the expense incurred by the lessee in erecting the messuages and buildings hereby demised, and of the rent and covenants on the part of the lessee hereinafter reserved and contained." This is the language of the lease.

In my view the expense incurred by the lessee, actually mentioned as part consideration in the lease itself, falls within the language of s. 13 of the Finance Act, namely, "payments

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made in consideration of the lease." It appears to me to be plain that the statute does not require the payments to be made into the pocket or the bank account of the lessor. The lessor may well get the value in the shape of payments made for what enhances, not the lessor's bank account, but the property demised. I cannot construe "payments made" in the narrow sense of payments in money made to the lessor. It does not appear to me that this is a sound construction of the statute, and I am quite clear that such a construction would be irrational once it is conceded that the making of payments or laying out of expense in the enhancement of the property would manifestly be a substantial part of the consideration in fact. The counsel for the Crown could not venture to suggest that, apart from this consideration and this expense incurred, this lease would have been entered into at anything like a rent of 125*l*. There was in fact a moderate rent and a large payment by way of expenditure. I think the statute clearly means that both these things must be taken into account.

My Lords, in my opinion it is highly desirable in the construction of this statute to make pronouncements carrying one no further than the actual points which the particular facts raise. I say so in view of an argument presented by the Crown on s. 13, sub-s. 2, to this effect: It was admitted that the thing to be ascertained was the amount by which the total value on the determination of the lease exceeds the total value of the land at the granting of it. But it was maintained that the limited construction contended for was defended by the words which are quoted in full as follows: "to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including in cases where a nominal rent only has been reserved the value of any covenant or undertaking to erect buildings or to expend any sums upon the property)." It was stated that this parenthesis signifies affirmatively that when, as here, the rent was not a nominal rent, Parliament has determined that the value of any covenant or undertaking to erect buildings or expend sums shall be kept out of view.

This might result in a serious inversion of the actual considerations which went to make up the bargain of parties;

and at some time a question may arise as to whether the construction of the Crown upon this parenthesis is justifiable. It may, for instance, be said that when the section speaks of payments made in consideration of the lease, it is referring to the view which is taken backward after perhaps a long lapse of years, and dealing not with payments made at the very time of the granting of the lease, but with payments truly in consideration therefor, actually disbursed subsequent to the time of the lease, but anterior, of course, and it may be for many years anterior, to that period of retrospect which the statute refers to. While payments in consideration of the lease might be, as at its date, either payments made or to be made, nevertheless, when viewed retrospectively, they are all payments made. One could figure this as an argument in opposition to the Crown. But, my Lords, I think it desirable expressly to avoid any pronouncement upon such a case. The puzzle which it presents may be rectified by Parliament itself.

But the case which is brought before your Lordships' House is not a case of prospective payments, because the fact is that the lease itself bore as a consideration that the expense had been incurred, and this is admitted to be true. When the lease was granted the payment was a payment made, if only "expense incurred" be embraced within such a term. That it should be so embraced I have no manner of doubt. I agree with my noble and learned friend Lord Dunedin in reserving my opinion on the subject of whether the entire amount of 6000*l.* fixed by Horridge J. should be taken into account. This question was not the subject of separate appeal.

I think the judgment of the Court of Appeal should be affirmed with costs.

Lord Parmoor. My Lords, this appeal raises a question with reference to the assessment of reversion duty, and there is no dispute on questions of fact. In 1892 six leases were granted by the trustees of the estate of the respondent at an aggregate rental of 125*l.*, and in consideration of the expense incurred by the lessee in erecting the messuages and buildings demised and of certain other covenants on the part of the lessee. It was

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subsequently agreed that these leases should be surrendered, and new leases were granted for a term of forty years from December 21, 1909. It is on the surrender of the six leases granted in 1892 that the occasion arises on which reversion duty is claimed. The learned judge before whom the case came found as a fact that the lessee had expended the sum of 6000*l.* upon the works specified. The case appears to have been argued on the footing that if the expense was one which comes within the language of s. 13 of the Finance Act, 1910, there was no question of any less sum than 6000*l.* being brought into the amount, and, for the reasons hereinafter stated, I am of opinion that it is necessarily a case in which the sum as a whole should be either allowed or disallowed.

In s. 13 of the Finance (1909-10) Act, 1910, on the determination of any lease of land, reversion duty is chargeable on the value of the benefit accruing to the lessor by reason of the determination of the lease. For the purposes of the section, the value of the benefit accruing to the lessor is measured by the amount which the total value of the land at the time the lease determines exceeds the total value of the land at the time of the original grant of the lease. The total value at the time of the original grant of the lease is to be ascertained on the basis of the rent reserved and payments made in consideration of the lease. There are further provisions to meet the case of a nominal rent and where the lessor himself is only entitled to a leasehold interest, but in the present case no question arises under either of these heads. Obviously there might be difficulties in estimating the total value of land at the time of the original grant of a lease many years ago, and the section, to obviate such a difficulty, directs a method of valuation which is based on ascertainable statistics.

It can hardly be denied that the 6000*l.* was a payment made in consideration of the lease, but it was argued that the payments specified in the section were limited to payments made to the lessor whether in the nature of a premium, or a fine, or some payment of a like character. There is no such limitation in the language of the section, and I can find no reason whatever why it should be inferred by necessary implication. The subject-

matter of the section is a duty based on the total value of land, and no element could more directly affect this value than expenditure made on the land in consideration of the grant of the lease. If the lessee was desirous of assigning his interest in the lease immediately after the grant of the lease to him, without loss, he would require the assignee to repay to him the amount he had expended and to take over the liability of the payment of the rent reserved or pay its capitalized value. In other words, the total value of the land at that date would be the capitalized rent together with payments made in consideration of the lease.

It is quite true that the expense incurred in building on the property might have been incurred by the landlord, and in this case the sum of 6000*l.* would not be made in consideration of the lease; but under such circumstances the lessee might be expected to pay as rent not only the 125*l.*, but an additional sum proportional to the expenditure of the lessor, which when capitalized should give the total value of the land at the time of the original grant of the lease. If instead of a sum of 6000*l.* being expended on the land it was paid away to the lessor as a fine or premium, it would follow that the value of the land at the date of the original lease was less, and this would be appropriately expressed in a diminished rental.

In the present case the whole fee simple of the land, without any expenditure incurred in building, would be less than 6000*l.*, so that there should be a minus rental if a premium or a fine of 6000*l.* had been paid to the lessor, but the real answer is that no one as a matter of business is expected to give as a premium on the grant of a lease more than the whole fee simple value of the land. Assuming, however, a premium of reasonable amount, this premium and the capitalized value of whatever rental might be paid would properly represent the total value of the land at the time of the original grant of the land. It follows that in whatever way it may be tested the method directed in the statute would, if properly applied, give the total value of the land on the basis of the rent reserved and payments made in consideration of the lease.

My Lords, I cannot think that any subsequent events can in

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any way affect the total value of the land as ascertained at the time of the grant of the original lease, seeing that this value is based on figures then known and certain. The buildings may be burnt down without insurance, or may be found to be useless and unprofitable, but this would not alter either the rent originally reserved or the payments made in consideration of the lease on which the section directs the valuation to be made. In my opinion, the right principle has been adopted in this case, namely, the capitalization of the rent reserved and the addition of the payment made in consideration of the lease. Any departure from this principle would necessitate an attempt to estimate the uncertain elements which the section properly excludes and would bring in the manifold difficulties in detail which the section is intended to avoid.

My Lords, in my opinion the decision of the Court of Appeal is right, and the appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 22, 1914.

Solicitor for appellants: *Hugh Bertram Cox, Solicitor of Inland Revenue.*

Solicitors for respondent: *Farrer & Co.*

[HOUSE OF LORDS.]

GOVERNING BODY OF WESTMINSTER SCHOOL . . . . . } APPELLANTS;

AND

REITH . . . . . RESPONDENT.

H. L. (E.)* 1914 Oct. 22.

Revenue—House Duty—School Buildings—"Offices belonging to and occupied with any dwelling house"—House Tax Act, 1808 (48 *Geo.* 3, *c.* 55), *Sched. B, r.* 2—*House Tax Act*, 1851 (14 *& 15 Vict. c.* 36), *s.* 2.

Rule 2 of Sched. B of the House Tax Act, 1808, provides that "every coachhouse, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and all other offices . . . . belonging to and occupied with any dwelling house" shall for the purposes of inhabited house duty be valued together with the dwelling house.

The school buildings of a public school included the college, being a residential building in which forty foundation scholars resided, and a building structurally disconnected from it containing a schoolroom, class-rooms, library, &c., which were used by all the boys, 270 in all, attending the school, foundationers and non-foundationers alike. Both buildings were in the occupation of the governing body of the school. The non-foundationers resided either at home or in one of the boarding-houses in the school precincts:—

Held by Earl Loreburn, Lord Dunedin, Lord Atkinson, and Lord Shaw of Dunfermline, Lord Parmoor dissenting, (1.) that having regard to the context in which the word "offices" was used in r. 2, the schoolroom, class-rooms, &c., were not "offices" within the meaning of the rule, and (2.) that assuming they were offices they were not offices "belonging to and occupied with" the college.

Held, therefore, that they were not liable to be assessed to house duty as accessories of the college.

Browne v. *Furtado* [1903] 1 K. B. 723 discussed.

Decision of the Court of Appeal [1913] 3 K. B. 129 reversed.

APPEAL from an order of the Court of Appeal (1) reversing part of an order of Horridge J. (2) upon a special case stated by the Commissioners for General Purposes of the Income Tax and Inhabited House Duty for the Division of St. Margaret and St. John in the county of Middlesex.

The appellants, the governing body of Westminster School, in

* *Present:* EARL LOREBURN, LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

(1) [1913] 3 K. B. 129. (2) [1913] 1 K. B. 190.

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whom the buildings hereafter mentioned were vested, under the Public Schools Act, 1868, for the use of the school, appealed to the Commissioners against assessments on them to inhabited house duty for the years 1906-7 and 1907-8 of the following school buildings valued as under:—

	£
A. Sanatorium	29 69
B. Ashburnham House, class-rooms, &c. .	425
C. College Buildings	200
D. School	300

The appellants claimed (1.) that Westminster School was a charity school within the meaning of the House Tax Acts and as such exempt from the charge of duty altogether; and (2.) that, assuming the school was not a charity school, buildings B and D were not liable to be assessed.

The Commissioners decided both points in favour of the appellants subject to the case stated for the opinion of the Court.

Horridge J. decided (1.) that the school was not a charity school and (2.) that the buildings B and D were not liable to be assessed.

The appellants did not appeal, but the respondent, the surveyor of taxes, appealed to the Court of Appeal against the decision of the learned judge upon the second point, with which alone the present appeal is concerned.

The Court of Appeal (Cozens-Hardy M.R., Buckley and Kennedy L.JJ.) allowed the appeal. They decided, first, on the authority of *Browne* v. *Furtado* (1), that buildings B and D were offices within the meaning of r. 2 of Sched. B of the House Tax Act, 1808 (2), and, secondly, that they were occupied with

(1) [1903] 1 K. B. 723.

(2) Rule 2 of Sched. B of the House Tax Act, 1808: "Every coachhouse, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and all other offices, and all yards, courts, and curtilages, and gardens, and pleasure grounds, belonging to and occupied with any dwelling house, shall, in charging the said duties, be valued together with such dwelling house; provided no more than one acre of such gardens and pleasure grounds shall in any case be so valued."

and belonged to buildings A and C within the meaning of that rule.

The material facts were as follows. There were at present 270 boys in Westminster School. Of these boys sixty were foundationers or King's scholars, of whom forty lived in the college and the remaining twenty either at their homes or in one of the boarding-houses attached to the school. The remaining 210 boys, the non-foundationers, resided either at home or in one of the boarding-houses. Of the buildings included in the assessments A and C, the college and the sanatorium, were admittedly dwelling-houses. The remaining buildings, B and D, consisted of a hall used only for prayers and general assemblies of the boys, class-rooms, the school library, book offices, tuck shop, common rooms, carpenter's shop, and lavatories. The whole of the 270 boys used these buildings and were taught in common.

There was complete internal communication between building A and building C and also between building B and building D, but there was no internal communication between buildings A and C on the one hand and buildings B and D on the other, the only communication between them being across an open space called Little Dean's Yard, which did not belong to the appellants.

The statutes and regulations of the governing body of Westminster School, so far as they relate to the terms upon which the buildings vested in the appellants were held and the purposes for which they were to be used, are fully referred to in the judgment of Lord Atkinson.

1914. July 17, 21. *Ryde, K.C.*, and *Konstam*, for the appellants. 1. Buildings B and D are not offices within the meaning of r. 2 of Sched. B of the House Tax Act, 1808. The word "offices" in the phrase "all other offices" must be read by the light of the preceding words "coachhouse, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy," and so read the word is used in the sense in which a house agent advertising a house would speak of offices. The object of the rule was to ensure that the occupier of a large house should not escape liability to inhabited house duty in respect of buildings subsidiary to the

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domus merely because these buildings, which in the case of a small house would be under the same roof, are not under the same roof. The word applies only to buildings which are ancillary to a dwelling-house. But the first object of the school is to educate, and at the present time only one boy in seven is housed on the spot. The college is ancillary to the school, and not the school to the college. Assuming that the word "offices" apart from the context might include buildings such as B and D, the rule ejusdem generis as explained by Hamilton J. in *Truman, Hanbury, Buxton & Co.* v. *Inland Revenue Commissioners* (1) applies. *Browne* v. *Furtado* (2), by which the Court of Appeal considered themselves bound, was wrongly decided and ought to be overruled. It is an isolated decision and is in conflict with the opinion expressed by Wright J. in *Clifton College* v. *Tompson* (3) and *Charterhouse School* v. *Gayler*. (4) But further it is distinguishable because in that case the only use of the buildings was in connection with the house itself.

2. These buildings are not offices "belonging to or occupied with" the college. Class-rooms which are used by 270 boys cannot be said to belong to a college of forty boys. They are in no sense appurtenant to the college. [Upon this point they referred to *Young* v. *Douglas* (5) and *Lambton* v. *Kerr*. (6)]

Sir John Simon, A.-G., and *Sir Stanley Buckmaster, S.-G.* (with them *William Finlay*), for the respondent. 1. A schoolroom is not a priori incapable of being an office, and it is immaterial that is not structurally part of the structure of the dwelling-house. *Browne* v. *Furtado* (7), which is directly in point, was rightly decided and ought to be applied. An office means a building where a duty is discharged. In this rule the word "offices" has a variable meaning depending upon the character of the central structure to which the offices are attached and the purpose for which that structure is used. The enumerated buildings do not constitute a genus and the word "offices" in this context is not necessarily limited to buildings of a domestic

(1) [1912] 3 K. B. 377, at p. 402.
(2) [1903] 1 K. B. 723; 4 Tax Cases, 537.
(3) [1896] 1 Q. B. 432.
(4) [1896] 1 Q. B. 437.
(5) (1879) 1 Tax Cases, 227.
(6) [1895] 2 Q. B. 233.
(7) [1903] 1 K. B. 723.

character. Thus if a dwelling-house were inhabited by a farmer or a publican a stable in connection with the house might be an office within the meaning of the rule apart from any private or domestic user and though it was used solely for the purposes of the business carried on in the dwelling-house.

2. Then if these buildings are offices are they belonging to and occupied with the college? The whole of the buildings claimed as the proper subject of assessment are used and occupied for the common purposes of the school, and B and D are not the less used in conjunction with A and C because they are used for other purposes also. The rule does not say "belonging only to." It is said that the college is an appanage of the school and not vice versa, but in *Lambton* v. *Kerr* (1) the same point was raised and it was overruled. As to occupation the appellants are the occupiers of the big school and also of the college, and that fact distinguishes this case from *Clifton College* v. *Tompson* (2) and *Charterhouse School* v. *Gayler*. (3) The two sets of buildings are occupied by the same occupiers and for a common purpose.

Ryde, K.C., replied.

Oct. 22. EARL LOREBURN. My Lords, the differences of opinion, both in the Court of Appeal and in your Lordships' House, show that the question in this case is one of difficulty. The appellants maintain that certain buildings used in connection with Westminster School ought not to be assessed to inhabited house duty. The buildings in question are those called Ashburnham House and School. It is common ground that these buildings are used as class-rooms, or for purposes of tuition, and that no one sleeps or lives in them. They are detached from the other buildings of Westminster School, and are used both by the boys who are boarded in the college and by those who live in boarding-houses and by town boys who live in their own homes away from the school altogether. If it is important, the number of the other boys is five or six times as great as those who live in the college.

Under these circumstances the Court of Appeal, reversing

(1) [1895] 2 Q. B. 233. (2) [1896] 1 Q. B. 432.
(3) [1896] 1 Q. B. 437.

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Horridge J., held that Ashburnham House and the "school" ought to be assessed to inhabited house duty, upon the ground that they were offices belonging to and occupied with a dwelling-house, namely, the college, in which some forty of the boarders live and sleep. I regret that I cannot agree with this conclusion.

The duty sought to be recovered is inhabited house duty. If it could be shown that the buildings in question were really part of an inhabited house, whether by reason of structural connection or in some other way, then they might possibly be assessable. I will say no more than that, for it is not contended that these buildings are assessable on that ground, and it is enough to deal with actual contentions.

The sole ground upon which the Court of Appeal proceeded was that under r. 2, Sched. B, of the Act of 1808 (which is incorporated into the Act of 1851) these buildings are assessable. Now r. 2 is as follows:—

"Every coachhouse, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and all other offices, and all yards, courts, and curtilages, and gardens, and pleasure grounds, belonging to and occupied with any dwelling house, shall, in charging the said duties, be valued together with such dwelling house; provided no more than one acre of such gardens and pleasure grounds shall in any case be so valued."

Can these buildings be brought within r. 2? It can be done only by saying that they are offices belonging to and occupied with the college buildings, that is to say, with the house in which some forty boys live and sleep.

I do not enter upon the decided cases, not from any want of respect, but because they all relate to different though in some degree analogous facts, and what we have to do here is to look at the facts of this case and see whether or not they come within the words of this rule. The circumstance that in other cases a chapel or a racquet court was held to be within or not within the rule does not help me to decide whether these structures are within it, though the point of view of the learned judges is undoubtedly valuable, and I am sure your Lordships are alive to its

importance. Still we have to see if the facts of this particular case fit the words of this particular rule.

My Lords, in my opinion Ashburnham House and the school are not offices at all within the meaning of this rule. The word "office" is a somewhat vague word with no precise meaning. The words preceding it in the rule ought to be looked at. They are, "Every coachhouse, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and all other offices." Reference has been made to the doctrine of ejusdem generis. I will merely say that when you are considering what is of ambiguous import in a rule or statute the whole context ought to be regarded in order to ascertain what was truly meant. And when I regard the words preceding I cannot believe that these class-rooms and tuition rooms ought to be included as offices. They are quite a different kind of thing from the coach-houses, and so forth, which are enumerated in the earlier part of the rule. Also, it seems to me, with all respect, that to call these tuitional buildings by the description of offices is doing violence to language as commonly used.

In the next place, even if they were offices they do not come within the words "belonging to and occupied with" the college. In fact, Ashburham House and the "school" are used by 270 boys, of whom 230 do not live in the college. It would be equally reasonable to say that they belonged to and were occupied with one of the boarding-houses other than the college. The inhabitants of the college have no special and no exclusive right to them, and, considering their numbers, have a comparatively small share in their use.

I am, therefore, of opinion that Horridge J. was right, and that the order appealed from ought to be reversed.

My Lords, I have received a communication asking me to say that my noble and learned friend Lord Shaw agrees with the opinion which I have expressed.

LORD DUNEDIN. My Lords, assessments to inhabited house duty for the years 1906-7 and 1907-8 were made upon the appellants, who are the governing body of Westminster School, and are, under the Public Schools Act, 1868, vested in the

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property of the subjects to be mentioned in respect of occupancy of the following buildings:—

	£
A. Sanatorium	29 / 69
B. Ashburnham House, class-rooms, &c.	425
C. College Buildings	200
D. School	300
E. Bursar's office	18
	£1041

No objection was made as to the assessment in respect of the bursar's office, but in respect of all the others the appellants appealed to the Commissioners for General Purposes of the Income Tax and Inhabited House Duty. They objected to the whole of the items, on the ground that the school was a charity school, and as such fell within case 4 of the Exemptions of Sched. B of the House Tax Act, 1808 (which are incorporated in the assessing Act of 1851). They also, and separately, objected to items B and D, on the ground that they were not inhabited dwelling-houses within the meaning of the statute of 1851.

The Commissioners sustained both objections. Appeal was then taken, and a case stated for the King's Bench Division of the High Court. Horridge J. sustained the appeal as regards the objection on the score of the school being a charity school, but upheld the determination in respect to items B and D. In this judgment the governing body of the school acquiesced, but the Crown appealed to the Court of Appeal, who sustained the appeal, and held that B and D fell to be assessed. The present appeal to your Lordships' House is from that judgment.

The facts as to the items B and D are set forth in the special case and elucidated by the accompanying plan. It is sufficient here to state that the buildings in question are used entirely for teaching and educational purposes—that they are so used by the whole of the boys attending the school, and are in no way confined to the use of the small section of the school known as the King's scholars who are boarded in item C—that no persons

sleep on any part of the items B or D, and that B and D are not structurally connected with C.

In this state of facts the Attorney-General frankly made the following admissions—all of which, in my opinion, he was bound to make. He conceded that as the duty was on inhabited dwelling-houses, the items B and D did not alone, or per se, fall under that description; that accordingly they must be shown to be part of, and assessed along with, C, which is admittedly an inhabited dwelling-house; and lastly, that as there is no structural connection between C, on the one hand, and B and D, on the other, he was forced to rely upon the effect of r. 2 of Sched. B of the Act of 1808, incorporated by reference into the Act of 1851. Rule 2 is as follows:—

"Every coachhouse, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and all other offices, and all yards, courts, and curtilages, and gardens, and pleasure grounds, belonging to and occupied with any dwelling house, shall, in charging the said duties, be valued together with such dwelling house; provided no more than one acre of such gardens and pleasure grounds shall in any case be so valued."

My Lords, the Attorney-General put his argument in two propositions. He said first that the word "office" was apt to describe such a thing as a building composed of class-rooms, &c., such as items B and D. For this proposition he naturally claimed the authority of *Browne* v. *Furtado.* (1) He then said that, holding B and D as an "office," it was in the circumstances of this case belonging to and occupied with the dwelling-house C.

I do not think that this separation of the proposition is the best way to consider the matter, not because I think it is intrinsically wrong, but because the considerations as to the true meaning of the word "office" and the true meaning of the words "belonging to and occupied with" cannot, I think, usefully be kept in separate compartments. In the view I take of the matter I am not concerned to say that the case of *Browne* v. *Furtado* (1) was wrongfully decided—a view which was urged by the appellants. All that *Browne* v. *Furtado* (1) decided as

(1) [1903] 1 K. B. 723; 4 Tax Cases, 537.

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a general proposition was that a schoolroom might be an "office."

It obviously does not follow from this that every schoolroom, or in particular this schoolroom, is an "office," and the determination of whether this schoolroom is or is not, is a question of the circumstances viewed as a whole, and does not solely depend upon whether it is occupied with and belonging to the dwelling-house C.

Now, the first point which I think clear is that the structures dealt with in r. 2 are all what I may term appanages of the principal taxable building, the inhabited dwelling-house. In fact, the rule is designed to make, so to speak, a fictional structural connection. I come to this conclusion not only in respect of the words "belonging to and occupied with," but in respect of what in argument was called the ejusdem generis rule of interpretation, though I prefer myself not so to designate it. Further, I point out that the words are "belonging to," not a person but a thing, which gets rid of all ideas of property and title and introduces the idea of fictional physical connection, incidentally, I think, turning the flank of criticism based upon the fact that the expression is "belonging to" and not "solely belonging to." What we have, therefore, to find out is whether B and D are truly accessories of C. If they are, accessorium sequitur principale. But if they are not, then you cannot turn the brocard round and read it as principale sequitur accessorium.

I now turn to the facts of the present case, and I may say at once that I think the true view was taken by Horridge J.

In the first place, let me say—though in the view I take of the facts it would make no difference in the result—that I entirely subscribe to what was said by Pollock B., giving the judgment of himself and Hawkins J., in *Governors of Charterhouse School* v. *Lamarque* (1): "The whole language and object of the Act . . . . point to the conclusion that whether a particular building is taxable or not is to be determined by its status when the liability to taxation arises."

The question in that case was whether the school was a "charity school" or not, i.e., it arose upon a claim for exemption, but the

(1) (1890) 25 Q. B. D. 121, at p. 125.

language used is general, and, in my opinion, perfectly accurate. Now, what are the facts at the date of the assessment? They are set forth in the special case.

There are 270 boys attending the school, only forty of them living in item C. The governors are vested in B and D, as separate subjects in no way connected with C, and these subjects are used for the education of all the boys in the school, with no privilege or discrimination in favour of the boys who sleep in C. In this state of facts I find it impossible to come to the conclusion that B and D are offices belonging to and occupied with C. It seems to me that the school buildings are the principal, and all else but the accessory. It seems almost a reductio ad absurdum to say that Ashburnham House, B, is an "office" of the college buildings, belonging to and occupied with it. Ashburnham House would never have been provided for the wants of the King's scholars, but was only made necessary by the number of boys who were not King's scholars and who needed schoolroom accommodation.

I have already said that I think the matter must be judged of in the year of assessment. If you took the year of the legislation which imposed the tax, i.e., 1851, the state of facts as between the King's scholars and other boys would be little different. But even if one had to go back to the establishment of the school in Queen Elizabeth's time, I would on the facts as stated in the special case come to the same conclusion. In it it is distinctly stated that the school was for all boys, not only for King's scholars.

It seems to me, with deference, that the Court of Appeal really begged the question. They seem to me to have assumed that the schoolrooms are an appanage of the college, and then upon that assumption they say it makes no difference if other outside boys are allowed to use it. I should agree if the question was put, "Do the presence of outside boys alter the condition of the college office?" But the real question is, "Is this schoolroom the college office?" For the reasons I have given, I think it is not.

I am therefore of opinion that the judgment of Horridge J. was right and should be restored; the respondent to pay the costs in this House and in the Court of Appeal.

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LORD ATKINSON. My Lords, it is unnecessary to restate any of the facts which have been already mentioned.

The Court of Appeal, differing from Horridge J., held that all these buildings coloured blue on the plan referred to in the case and lettered B and D, though admittedly not lived in by any one, and not structurally forming part of, or being internally connected with, the buildings coloured pink, or with any other building in which any one lived, were, within the meaning of r. 2 of the Schedule of Rules attached to the House Tax Act of 1808, an office or offices "belonging to and occupied with a dwelling-house," namely, the building coloured pink. The question for the determination of this House is which of these decisions is right. The case sets forth that the school originally (i.e., immediately after the Reformation) formed part of the whole College of St. Peter's, Westminster, and that the foundation, as constituted by Queen Elizabeth in 1560, consisted of a Dean and Chapter and several officials, including a headmaster, an usher, and forty scholars, called King's or Queen's scholars, according to the sex of the reigning Sovereign for the time being, the Dean and Chapter being the governing body. The foundation so described continued to exist until, under the Public Schools Act of 1868 (31 & 32 Vict. c. 118), a new body of governors was created. The buildings marked blue were then vested in them, and an income of 3500*l.* payable by the Ecclesiastical Commissioners was assigned to them. The school has for many years been vastly expanded.

It is found in the case stated (paragraph 7) that there are now 270 boys in the school, sixty being King's scholars, forty of whom, or little more than one-seventh of the entire number of pupils, reside in the buildings marked A and C, and twenty reside either in their own homes, or in the boarding-houses marked 1 and 2, each of these latter being inhabited, under the provisions of s. 13 of the Act of 1868, by one of the masters of the school. The headmaster holds his office at the pleasure of the governing body. All the other masters are appointed by him and hold office during his pleasure; but the boarding-houses resided in by these masters are, apparently, in their occupation. Resident King's scholars are each maintained and educated for 30*l.* per

annum. Non-residents (King's scholars) living at home get their education free, and non-residents residing in a boarding-house receive what is equivalent to a scholarship of 60*l.* per annum.

In paragraph 4 of the case stated it is mentioned that town boys, that is, boys who are not scholars, are allowed by the original statutes to attend the school. That is, in my view, a rather inadequate description of their true position under the statutes and by-laws mentioned in the succeeding paragraph.

By s. 5 of the Public Schools Act of 1868 (31 & 32 Vict. c. 118) the new governing body was incorporated and empowered to hold lands for the purposes of the school, with the same power of leasing as that possessed by the Dean and Chapter. By s. 6 they were empowered to make statutes with respect, amongst other things, to scholarships and exhibitions and other emoluments, tenable either at the school, or on quitting the school by boys educated thereat. Under this section a statute was passed on July 28, 1871, approved of by the Queen in Council on November 6, 1871, and amended by the Queen in Council on March 26, 1878, and February 26, 1880, making all classes of boys attending the school equally eligible to compete for both university and school exhibitions and other prizes. By sub-s. 7 of the same section the governing body were empowered to make statutes respecting the disposal of the income and of the property of the school, either for the purpose of improving or enlarging the existing establishment, or of founding scholarships tenable at school or elsewhere, &c. The word "establishment" clearly means, I think, in this connection, the whole establishment, not the mere "foundation."

By s. 20 of the Act of 1868 special provisions are made for this Westminster School, and after providing for the payment to the governing body by the Ecclesiastical Commissioners of 3500*l.* per annum, by sub-s. 6 it expressly enacts that "from and after the passing of this Act there shall vest in the governing body for the time being of Westminster School for the use of the school the playground in Vincent Square, with the lodge on such playground, the dormitory with its appurtenances, the school and class rooms, the houses and premises of the head master and under master, the three boarding-houses, and the gymnasium,

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excepting the crypts." Then sub-s. 7 provides that all the said buildings shall be held by the said governing body for the use of the school. The school and class rooms and other buildings are thus impressed by statute with a trust for the benefit of the whole school. They are to be held for the use of the whole school, not for the sole use or benefit of the college or its inmates, or as an appanage of that college or of the foundation.

Special provision is then made for the King's scholars in sub-s. 8, by which it is enacted that the hall and playground in Dean's Yard shall continue to be used as heretofore by the scholars of Westminster School.

Again, provision is made in one of the regulations or by-laws for town boys becoming home boarders, special half-boarders, or special boarders. These boarders dine with the King's scholars in the college hall, and this arrangement is stated to be designed "to provide as far as possible for day boys the advantages of the home system of public schools." In the face of these enactments it would appear to me impossible now to treat the college or foundation, according to the ordinary use of language, as the central part or nucleus of this school, the day school being merely an excrescence upon, or benevolent accretion, or a subordinate accessory to it.

I now turn to the statutes. It will be observed that the subjects taxed under the statute of 1851, as under the earlier Acts, are inhabited dwelling-houses; certain adjuncts are treated merely as enhancing the value of each of these dwelling-houses and thus increasing the tax upon them. The adjuncts are not themselves separately assessed or taxed. Sect. 2 of this statute adopts the values set forth in Sched. B attached to the Act of 1808. And upon the construction of r. 2 of this latter schedule the question for decision in this case turns. The rule runs thus:

"Every coachhouse, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and other offices, and all yards, courts, and curtilages, and gardens, and pleasure grounds, belonging to and occupied with any dwelling house shall, in charging the said duties, be valued together with such dwelling house; provided no more than one acre of such gardens and pleasure grounds shall in any case be so valued."

Common occupation of the dwelling-house and one of the enumerated subjects is not enough. The subject must "belong to and be occupied with the dwelling-house." This indicates that the principal and the accessory must be closely associated. And, prima facie, one would be inclined to think that, having regard to the state of things in the year 1808, the enumerated subjects were those whose purpose and use was what might be styled "domestic," that is, a purpose and use which contributed to the greater comfort and enjoyment of the dwelling-house as a dwelling-house, i.e., making it a more comfortable and enjoyable residence.

The Court of Appeal, however, have held, as I understand their decision, that as regards these vast blocks of buildings coloured blue, despite the trust impressed upon them, the purpose for which they were acquired by the present owners, and the uses to which they are devoted, there exists between them and the college that close association which the rule requires, and that they are, within its meaning, merely offices or an office belonging to and occupied with this latter. If this be so it is difficult to see on what principle these same class-rooms do not equally belong to each of the boarding-houses in which some of the remaining one-third of the King's scholars reside. The houses satisfy the same requirements of the King's scholars who reside in them, as does the college of the King's scholars who reside in it, and the class-rooms and other buildings are used equally by all the sixty King's scholars for the same purpose and by the same right.

If the boarding-houses are still in the occupation of the governing body, notwithstanding the residence of the masters in them, then the class-rooms are occupied "with them" as truly in the one case as in the other. In my view, however, these class-rooms and buildings coloured blue are prima facie not adjuncts of either the college or the boarding-houses. They do not "belong to" either the one or the other. The persons residing in the college or boarding-houses have, by virtue of that residence, no rights in or to those class-rooms, &c., different in kind from those enjoyed by non-resident pupils. The King's scholars, no doubt, get their tuition free of charge. The town

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boys pay for it, but the education is of the same kind, is given in the same place, and by the same masters. The class-rooms are held by the governing body upon trusts, under which the town boys, quite as truly as the others, stand in the position of beneficiaries. This is, I think, the common-sense and rational view of the true position of things, and the true relation of these different classes of school buildings to each other, and I do not find anything in the provisions of the statutes conversant with the subject, or in the authorities decided upon them, requiring one to adopt a different and, as it appears to me, a somewhat artificial view.

By r. 3, Sched. B, of the Act of 1808, it is provided that all shops and warehouses which are attached to dwelling-houses, or have communication therewith, shall be valued with the dwelling-houses and "the household and other offices aforesaid" thereunto belonging. Two classes of warehouses are excepted from this provision, namely, (1.) buildings upon or near adjoining to wharfs, and (2.) such warehouses as are distinct and separate buildings, and not parts or parcels of such dwelling-houses, or the shops attached thereto, but employed solely for the purpose of lodging goods, wares, and merchandise, or for carrying on some manufacture (notwithstanding the same may adjoin to or have communication with the dwelling-house or shop). The words in brackets obviously refer to warehouses employed for carrying on some manufacture. An argument was founded on the words occurring in this rule, "the dwelling-house and the household and other offices aforesaid belonging thereto," to show that the words "other offices" used in r. 2 could not be confined to merely "household" or "domestic" offices, as they were styled, and that when a dwelling-house was, while it so remained, used in part for another and additional purpose, a building constructed or devoted to subserve this additional purpose solely would be, or might be, an "office belonging to and occupied with the dwelling-house" within the meaning of r. 2. This may possibly be so. If an artist, for instance, who used one of the rooms of his dwelling-house as a studio in which he painted his pictures chose to build an additional studio in his garden, it may well be that under this latter rule the new studio would

properly be held to be an office belonging to and occupied with his dwelling-house. That argument, however well founded, does not, in my view, help the case of the Crown. There is no analogy whatever between the case of the additional studio and these vast class-rooms. They do not stand to the college in a relation at all resembling that in which the additional studio would stand to the dwelling-house of the artist, and still less do they stand in the relation in which the shop or warehouse or factory of the trader or manufacturer stands to the dwelling-house to which it was attached, or with which it had communication, inasmuch as these class-rooms, &c., are, as already pointed out, dedicated by statute to the use equally of every pupil of the school, wheresoever he resides, or to whichever of the two categories of pupils he belongs.

The 3rd section of the Act of 1851, and the rules contained in it in favour of trade and business, make further provision as to houses occupied for business premises or bona fide used for the purpose of husbandry only; but it is unnecessary to refer to them since they do not affect the case, inasmuch as it was not contended, as I understood, that these school buildings came within the operation of any of those provisions.

Now as to the authorities. In *Lambton* v. *Kerr* (1) the appellant, Lambton, occupied premises consisting of (1.) a dwelling-house, called Park Lodge, containing ten rooms, with domestic offices and a garden of about one rood in extent; (2.) half an acre of ground on the east side of the dwelling-house and communicating with it by two gateways; and (3.) stables and saddle rooms ranged on the three sides of the stable yard. The appellant carried on the business of a trainer of racehorses in these premises, and the stables would accommodate about thirty-nine horses. It is not stated in the case whether any of these stables were built by the appellant, or whether they did not form a part of the premises as they originally stood before he occupied them. Sleeping accommodation was provided for four of the stable lads over the stables, and the dwelling-house itself was occupied, and apparently resided in, by the servant of the appellant called the "head lad." I find it stated by Grantham J.

(1) [1895] 2 Q. B. 233

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at p. 237, that the learned judges "find that the stables are not only stables, but that they contain rooms which are practically a dwelling-house for men who belong to the stables and who work in them. Therefore, besides the stables, we have these four rooms in the stables, and we have a separate dwelling-house which is practically attached to the stables. Looking, therefore, at the buildings as a whole, I am clearly of opinion that the case comes within the decision in the Scotch case of *Cheape* v. *Kinmont*." (1)

Charles J. gives the pith of his judgment in this sentence: "They were being used by those persons, not as mere caretakers, but for a common purpose—namely, the purpose of training horses. Therefore, whilst on the one hand the stables may be said to belong to the dwelling-house, on the other hand the dwelling-house equally belongs to the stables: they each belong to the other, and are both used for a common purpose. That is the conclusion at which I should arrive, apart from authority." And he then refers to *Cheape* v. *Kinmont*. (1) It was clear that these stable lads did not live in the houses and stables for the purposes of protecting them, but to carry on the appellant's business. And, therefore, the case could not have fallen under the 41st & 42nd Vict. c. 15. The case has no resemblance, however, to the present case. The same may be said of the case of *Cheape* v. *Kinmont*. (1)

The cases of *Clifton College* v. *Tompson* (2) and *Charterhouse School* v. *Gayler* (3) were really decided on the ground that the school houses were in the occupation of the governing body, while the houses in which the boys resided were in the occupation of the masters, whereas r. 2 requires that the "office should be occupied with the dwelling-house." There was, therefore, no common occupation of the two buildings.

The case of *Browne* v. *Furtado* (4), and especially the judgment of Stirling L.J., was much relied upon by the Crown, while your Lordships were pressed on behalf of the appellants to overrule it. It does not appear to me to be at all necessary to overrule it in order to decide this case in favour of the appellants. There the buildings in dispute were only separated

(1) (1888) 2 Tax Cases, 418.
(2) [1896] 1 Q. B. 432.
(3) [1896] 1 Q. B. 437.
(4) [1903] 1 K. B. 723.

by a wall from the residence of the appellants, the residence of the assistant masters, and the dormitories and living rooms of the pupils, all of whom were boarders. Through a doorway in this dividing wall on the ground floor, and through a passage, which was roofed in, access was free from one building to the other.

The whole of the buildings, disputed and not disputed, were contained in the same enclosed ground, and the disputed buildings contained class-rooms, play-rooms, gymnasium, closets, carpenter's shop, chapel, &c., and other rooms necessary for carrying on the business of the school and the proper training and education of the boys. Stirling L.J. was not satisfied that these disputed buildings formed, structurally, one building with the dwelling-house. They were, however, all in the occupation of the schoolmaster, were built in 1893 and 1897, and were all used solely for the purposes of the boarding school carried on in the main building. No person resided in them and no persons used them save these pupils.

The ground of the decision was that it was not necessary that the word "offices" mentioned in r. 2 should be confined to those offices which were only used for the "domestic" purposes of a dwelling-house as such, but might be held to include buildings, such as these, which served a purpose to which the dwelling-house was put, in addition to the purpose of the residence of the occupier himself and his family. The fact remains, however, that the disputed buildings were built and used for the accommodation of residents in the dwelling-house, and for the accommodation of none others.

In the cases of *Young* v. *Douglas* (1) and *Cheape* v. *Kinmont* (2), referred to by the learned Lord Justice, it was stated by him that the general ground upon which the decisions in these cases appear to have been based was this: that where there are buildings occupied together with a building which is admittedly a dwelling-house, and used for the same purposes for which the dwelling-house is used, the whole buildings are subject to the tax. He further states that he does not dissent from that view. But the facts of all these cases are wholly different from the facts of the present case. The buildings coloured blue on the map are not

(1) 1 Tax Cases, 227. (2) 2 Tax Cases, 418.

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used for the same purposes for which the college is used. They are not used solely for the teaching of those dwelling in the college, but for the teaching of hundreds of others residing elsewhere, each and every one of whom has the same right to use these buildings as have the residents of this dwelling-house.

I am, therefore, of opinion that there is nothing in the statute dealing with these matters, nor in the authorities decided upon them, to lead one to put upon this rule, as applied to the facts of this case, the construction put upon it by the Court of Appeal. I think, with all respect, that construction is erroneous, that the decision of Horridge J. was right and should be upheld, and that this appeal be allowed with costs in this House and in the Court of Appeal, but no costs to either party in the Court of first instance.

LORD PARMOOR. My Lords, I regret to differ from the other noble lords who heard this appeal, and have formed the conclusion that the decision of the Court of Appeal is right and should be maintained. The question to be determined is whether certain buildings, whose position is shown upon a plan attached to the case, and which consist of a large schoolroom called "Up school," class-rooms, the school library, book office, tuck shop, common room, carpenter's shop, and lavatories, should be assessed under r. 2 of Sched. B of the House Tax Act, 1808. The Court of Appeal has held that these buildings should be assessed as coming within the language of the rule, and it is against this decision that the appeal is made to this House. Subject to a proviso which is not material, r. 2 provides that every coachhouse, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and all other offices, and all yards, courts, curtilages and gardens and pleasure grounds, belonging to and occupied with any dwelling-house, shall in charging the said duties be valued together with such dwelling-house. Unless the context in which it is used implies limitation, the word "office" is a word of wide signification including places where public or private business is transacted as well as parts of a house or building used for household work or service. It is not material whether in comparison with the remainder of the building or buildings the office or offices happen to be large or small. Unless the context has introduced a limitation,

the buildings in question would, I think, be clearly comprised within the words "all other offices," subject, no doubt, to a compliance with the later conditions stated in r. 2.

It was argued on behalf of the appellants that the buildings in question did not come within the words "all other offices," and that the principle of "ejusdem generis" would exclude them. If the particular examples enumerated, such as coachhouse, stable, brewhouse, washhouse, bakehouse, dairy, are limited to buildings exclusively of a household and domestic character, then no doubt the words "all other offices" should be construed only to include buildings of a similar type, and such buildings as a schoolroom or class-room would not come within the type.

I am unable to assent to the argument that the enumerated examples are so limited, and the words appear to me to be equally applicable when the buildings are used for business or other purposes. If this is correct, the principle of ejusdem generis tells against the argument on behalf of the appellants, and the words "all other offices" would be capable of including not only buildings of a domestic or household type, but also buildings used for business or other purposes of which the buildings B and D would be a type.

The same question arose in the case of *Browne* v. *Furtado*. (1) I entirely agree with the opinion expressed by Stirling L.J.: "The argument for the schoolmaster was that, regard being had to the nature of the buildings specifically enumerated in the rule, which are all of a household or domestic character, the 'other offices' thereby contemplated must be offices used for the purposes of the house considered as a dwelling-house, whereas the buildings here in question are used for the purpose of the business carried on by the occupier. It was said that it was not in accordance with the language of the rule to hold that such buildings should be included in the valuation. I cannot assent to that argument."

The only difference which can be suggested between that case and the present, so far as the construction of r. 2 is concerned, is that the governing body of Westminster School do not use the buildings in question for the purpose of obtaining profit from a business, but this distinction appears to me to be immaterial.

(1) [1903] 1 K. B. 723.

H. L. (E.) 1914 GOVERNING BODY OF WESTMINSTER SCHOOL v. REITH. Lord Parmoor.

The real effect of the judgment in *Browne* v. *Furtado* (1) is that, if the doctrine of ejusdem generis applies, as was claimed by the appellants, the type or genus is not restricted to buildings of a household or domestic character, but is capable of including buildings used for other purposes. In my opinion, the argument for the appellants under this head cannot be accepted.

It is not sufficient that the buildings B and D should be capable of being included under r. 2 unless they comply with the conditions that they belong to, and are occupied with, a dwelling-house, in this case with the buildings coloured pink on the plan and marked A and C. These are the only conditions, and no further condition can properly be introduced. The appellants occupy both buildings, and in this respect the present case is clearly distinguishable from the cases of *Clifton College* v. *Tompson* (2) and of *Charterhouse School* v. *Gayler*. (3) The buildings are further occupied for the common purpose of a school, and where buildings in a common occupation are occupied for a common purpose they are occupied with one another within the language of r. 2. I agree with the unanimous decision of the Court of Appeal.

The question whether the buildings B and D belong to buildings A and C raises more difficulty. In ordinary language a school-room and class-rooms, of whatever relative size or capacity, are buildings which belong to other school buildings, such as a sanatorium or a dormitory, and form with them the buildings, or a portion of the buildings, which constitute the school establishment. The present case is a particularly strong one. The buildings are immediately adjacent to one another, and, if there had been efficient internal communication, would have constituted one inhabited dwelling-house within the meaning of the House Tax Act: *London and Westminster Bank* v. *Smith*. (4) Rule 2 was intended to provide that buildings should not escape liability to taxation from the non-existence of internal communication, and unless there are special circumstances adequate to negative the natural inference, I can come to no other conclusion than that buildings B and D belong to buildings A and C.

(1) [1903] 1 K. B. 723.
(2) [1896] 1 Q. B. 432.
(3) [1896] 1 Q. B. 437.
(4) (1901) 85 L. T. 747.

In the years in question there were 270 boys at the school, all of whom used the buildings B and D in common. Of these 270 boys only forty are housed in the buildings A and C, whereas the rest either reside in their own homes or in boarding-houses which are not in the occupation of the appellants. It is said that under such circumstances, and having regard to their relative size and extended user, the buildings B and D cannot be regarded as belonging to the buildings A and C, and that they might as well be regarded as belonging to the boarding-houses which are not in the occupation of the appellants, or even to the homes of the boys.

This argument would have weight if r. 2 were limited to cases in which the offices sought to be included belonged solely to the particular dwelling-house, but no such restriction is to be found in the language of the rule, and I should hesitate to introduce it. If logically applied it would exempt from taxation offices not solely belonging to, or occupied with, the particular dwelling-house, and there would not be much difficulty in making adjustments to escape the liability to taxation.

On this point I agree with the view expressed in the Court of Appeal by the Master of the Rolls, that the buildings B and D plainly belong none the less to buildings A and C because other boys use them for the same purpose as the King's scholars residing in A and C. There is no doubt that the buildings B and D are not inhabited dwelling-houses, and do not communicate internally with an inhabited dwelling-house, so that the only question to be determined is whether they come within r. 2.

My Lords, in my opinion the decision appealed against is right, and the judgment of the Court of Appeal should be affirmed, with costs.

Order of the Court of Appeal reversed and order of Horridge J. restored. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House.

Lords' Journals, Oct. 22, 1914.

Solicitor for appellants: *H. B. Willett.*

Solicitor for respondent: *H. Bertram Cox, Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

IN COMMITTEE FOR PRIVILEGES.*

1914
July 8.

ST. JOHN PEERAGE CLAIM.

Peerage—Constitution of Parliament for Peerage Purposes—Necessity for Representatives of the Three Estates—"Plenum Parliamentum"—Assembly of Bishops, Earls, and Barons "in full parliament" followed by Attendance of Commons at a later Date.

The use of the term "plenum parliamentum" is not conclusive to show that the assembly to which it is applied is a parliament for peerage purposes. To constitute a parliament for peerage purposes it is essential that the Commons should be represented thereat and that it should conform in its more essential characteristics to the Model Parliament of 1295.

Upon a claim for an ancient barony the claimant proved by an entry in the Parliament Roll of the 18th Edw. 1 that on May 29, 1290, the ancestor from whom he traced his title sat in an assembly held at Westminster of bishops, earls, and barons, who, assembled "in pleno parliamento" and for themselves and, "quantum in ipsis est," for the whole community, granted to the King an extraordinary aid of 40*s.* per knight's fee to marry his eldest daughter. A fortnight later the King issued writs to the sheriffs for the election and return of two or three knights for each shire, who arrived on July 15. Before the arrival of the knights this Parliament passed the Statute Quia Emptores:—

Held by Lord Parker of Waddington and Lord Parmoor, with the concurrence of Viscount Hutchinson and Lord Stanley of Alderley, Lord Atkinson and Lord Hylton dissenting, (1.) that the assembly of May 29 was not a Parliament so constituted as that a sitting therein in pursuance of a writ could form the foundation for a claim to a hereditary peerage; (2.) that it was impossible to presume from the presence of the claimant's ancestor at that assembly on May 29 that he continued to sit therein after the arrival of the knights of the shire.

Held, therefore, that the claimant had failed to prove the existence of the alleged barony.

Hastings Peerage Claim (1841) 8 Cl. & F. 144 not followed.

THIS was a petition by Captain Francis William Forester, who claimed to be a coheir to the ancient barony of St. John, which was in abeyance, praying that the abeyance might be determined

* *Present:* VISCOUNT HUTCHINSON (EARL OF DONOUGHMORE) in the chair, LORD STANLEY OF ALDERLEY (LORD SHEFFIELD), LORD HYLTON, LORD ATKINSON, LORD PARKER OF WADDINGTON, and LORD PARMOOR.

in his favour. The case stated that the barony fell into abeyance in 1428 on the death of the sixth Lord St. John and had remained in abeyance ever since. It stated further that there had been several baronies of St. John and that the particular barony now in abeyance had been frequently styled St. John of Basing; but that it was the original and senior barony of the name and that the name and addition "of Basing" did not occur in the earliest writs of summons.

The petitioner claimed descent from John de St. John, who was summoned by writ to the Shrewsbury or Acton Burnell Parliament of 1283 and also to a Parliament of 1299, and who sat in a Parliament held at Westminster in 1290. His son, John de St. John, the second, was occasionally summoned to Parliament during the lifetime of his father and was repeatedly summoned to Parliament after his father's death from 1304 to 1330. In some of these summonses, as also in certain summonses to attend the King cum equis et armis, the second John de St. John was described as a baron. It was, however, not proved that he ever sat in Parliament, nor was any other sitting proved except the sitting above referred to. The substantial question in this case was whether the Parliament of May 29, 1290, at which the first John de St. John was present, was a properly constituted Parliament in the sense that a sitting thereat in pursuance of a writ could form the foundation of a claim to a hereditary peerage by a writ and sitting in Parliament.

The sitting was proved by an extract from the Parliament Roll. The extract stated that on the morrow of Holy Trinity in the eighteenth year of Edward I. "in pleno parliamento ipsius domini regis" certain named bishops, earls, and barons, among whom were included John de Hastings, John de St. John, and Nicholas de Segrave, "et ceteri magnates et proceres tunc in parliamento existentes, pro se et communitate tocius regni quantum in ipsis est," granted to the King an extraordinary aid of 40*s*. per knight's fee for the marriage of the King's eldest daughter.

The original is of course abbreviated, but for convenience an extended copy of the extract has been prepared and will be found in a note at the end of this report.

In the Close Roll of the same year there appeared a letter from

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the King to the Pope complaining of certain encroachments, and a second letter on the same subject in the names of Edward, the King's son, six earls, and certain other persons, including John de St. John, therein described as barons ("barones"). All the persons therein referred to as barons were mentioned as being present at the Parliament of May 29, 1290.

1914. March 25, 26; April 1; May 20, 25. *Sir Robert Finlay, K.C.* (with him *Cozens-Hardy, K.C.*, and *Fox-Davies*), for the petitioner. The petitioner claims to be entitled to an ancient barony by writ and a sitting in Parliament dating from 1283. The first John de St. John was summoned to the Parliament of Shrewsbury in 1283 and also to the Parliament of 1299, but there is no actual proof of a sitting in either of those two Parliaments. He also sat in the Parliament of 1290, but there is no evidence of a writ of summons to that Parliament. But where a sitting is proved it is settled by authority that a summons will be presumed on the principle of omnia rite acta praesumuntur. It is also settled that where there is proof of a writ of summons to a Parliament followed by a sitting in a later Parliament the peerage will relate back to the writ of summons. The validity of the Parliament of 1290 is established by the decision of your Lordships' Committee in the *Hastings Peerage Claim* (1), in which Lord Cottenham pronounced the leading opinion, and the validity of the Parliament of 1283 is recognized by Lord Cairns in the *Mowbray and Segrave Peerage Claims* (1877). In fact the only doubt as to the validity of these Parliaments rests on the authority of Dr. Stubbs, who says that it is convenient to adopt the year 1295 as the era from which the baron whose ancestor has been once summoned and has once sat in Parliament can claim an hereditary right: Stubbs' Constitutional History, 4th ed., vol. ii., p. 192, par. 190. But the baronies of Le Despencer and Ros date from 1249: Report on the Dignity of a Peer, vol. i., pp. 165, 436—439. The question of the validity of the Shrewsbury Parliament of 1283 was recently argued in the *Dynaunt, Fitzwaryn and Martin Peerage Claims* (1914), and the Committee then held on the evidence that the Martin peerage should date from 1295, but no

(1) 8 Cl. & F. 144.

definite opinion was expressed against the validity of that Parliament.

[Counsel then argued the question of the status of the Shrewsbury Parliament at length, but having regard to the view taken by the Committee in the present case the point did not arise for decision and it is not thought necessary to report his argument. Upon the suggestion of the Chairman it was arranged that the Attorney-General should argue the question of law before the proofs as to the pedigree were proceeded with.]

Sir John Simon, A.-G. (with him *Raymond Asquith*), for the Crown. The Parliament of 1283 was not a properly constituted Parliament for the reasons recently urged on behalf of the Crown in the *Dynaunt, Fitzwaryn, and Martin Peerage Claims.* The Parliament of 1299 was a very small council and it cannot be contended that it was such a Parliament as entitled those who were summoned to it and sat in it to an hereditary peerage. The summons was addressed to a select number of bishops and earls, fourteen in all, and that was followed by a summons to a great number of people to attend cum equis et armis. But the substantial question is as to the validity of the Parliament of 1290, in which John de St. John sat, because no other sittting is proved, and it is well settled that a sitting will not be presumed from a writ or a succession of writs. That assembly, which met on May 29, 1290, was not such a Parliament as could be made the foundation of a peerage. There was a Parliament in the summer of 1290, but it was not till June 14 that the sheriffs were directed by writ to secure a return of the knights of the shire, and it was not until July 15 that those knights of the shire were returnable. Parliament had not begun at the time when the matters referred to in the record put in by the claimant occurred. The assembly of May 29 was a meeting of the King's principal military tenants in chief for the purpose of granting, on behalf of themselves and, "quantum in ipsis est," all the other military tenants, an extraordinary aid on the occasion of the marriage of the King's daughter. It was a grant chargeable on knights' fees and nothing else. The words "quantum in ipsis est" suggest a doubt how far such an assembly could bind those who were absent, and, having regard to the subject-

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matter of the record, the words "pro communitate totius regni" can only refer to the community of tenants by military service. That is the explanation of the meeting to be found in the Report on the Dignity of a Peer, vol. i., pp. 199, 200, where it is stated that the bishops were present in their character of military tenants. This meeting was necessary because by arts. 12 and 14 of Magna Carta no aid could be levied except for the ransoming of the King's person, the knighting of the King's eldest son, and the marrying of the King's eldest daughter—and then only a reasonable (which meant the customary) aid—but by the common counsel of the nation; and this was an extraordinary aid because the sum demanded by the King on this occasion was 40*s.* instead of the customary 1*l.* 6*s.* 8*d.* per knight's fee. The record relates merely to a feudal grant by military tenants of something more than they could be called upon to pay unless they specially agreed to do so; it was not a parliamentary proceeding at all. It has never been held by any Committee that sitting in an assembly makes a man a peer of Parliament unless it is an assembly which consists of the three estates of the realm. The same view of this meeting is taken by Dr. Stubbs, who says that in 1290 the Barons granted an aid pur fille marier and that subsequently the knights of the shire were summoned to join in a grant of a fifteenth: Stubbs' Constitutional History, 4th ed., vol. ii., p. 255, par. 223: Stubbs' Select Charters, 9th ed., p. 470. This, as Dr. Stubbs explains, was a transitionary period in the history of Parliament, and in view of the existing state of our knowledge he treats the Model Parliament of 1295 as the first completely constituted Parliament for peerage purposes.

It appears that the Statute of Quia Emptores was passed in the Parliament of 1290 early in July, before the arrival of the knights of the shires, but much of the legislative work of Edward I. was done without the co-operation of the Commons, and at this period the passing of a statute affords no conclusive indication of the constitution of the Parliament: Stubbs' Constitutional History, 4th ed., vol. ii., p. 259, par. 224. See also Maitland's Constitutional History, pp. 69—73.

The use of the terms "parliamentum" and "plenum parliamentum" does not conclude the matter, for in the reign of

Edward I. these terms are used sometimes in respect of a Parliament in the modern sense and sometimes in respect of an assembly which was not an assembly of the estates of the realm at all: Pike's Constitutional History of the House of Lords, p. 48; Maitland's Memoranda de Parliamento, 1305, Introduction, pp. xxxiv.—xxxvi., xliv., lxxxviii.; Stubbs' Constitutional History, 4th ed., vol. ii., pp. 236, 274, pars. 215, 230. These authorities show that the use of the word "parliamentum" is not per se conclusive of, and indeed is hardly relevant to, the issue whether a particular assembly is so constituted as that a sitting thereat in pursuance of an individual summons entitles a man to claim a descendible dignity. "In pleno parliamento" meant no more than in solemn conclave.

The opinion of Lord Cottenham in the *Hastings Peerage Claim* (1) is not binding on the Committee, and the researches of Dr. Stubbs and Professor Maitland show that it cannot now be regarded as historically correct. Moreover the validity of this Parliament of 1290 does not appear to have been disputed by the then Attorney-General, Sir John Campbell, and the main point of that decision was whether from a clear record of a sitting in Parliament a summons could be inferred. As regards the *Mowbray and Segrave Claims*, looking at all the facts in the two cases and at the terms of the resolutions, the decision of the Committee cannot be treated as inferentially confirming the proposition that a sitting at the assembly of May 29, 1290, was a sitting in Parliament. That the decision of the Committee for Privileges in a particular peerage claim is not a binding authority in another peerage claim, although the facts in the two cases may be similar, is established by the *Wiltes Peerage Claim.* (2)

Sir R. Finlay, K.C., and *Cozens-Hardy, K.C.* (with them *Fox-Davies*), contra. The expression "plenum parliamentum" was never used for a mere assembly of tenants in capite; it was never used except for a representative legislative assembly. [In support of this contention reference was made to a series of writs and entries in the Parliament Rolls relating to the Parliaments held between the years of 1275 and 1333.] It is said that the assembly at which the aid was granted and the assembly to

(1) 8 Cl. & F. 144. (2) (1869) L. R. 4 H. L. 126.

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which the knights of the shire were summoned were two separate Parliaments, but it was one continuous Parliament. In the year 1290 there were three Parliaments, a Parliament held after Hilary, which sat for judicial work, a Parliament held after Easter, and a Parliament held after Michaelmas. The Committee is concerned with the second Parliament only. The history of this Parliament, which met on May 29, is given in the Report on the Dignity of a Peer, vol. i., pp. 195—202. It was attended in the first instance by the barons and great men and afterwards by the knights of the shire. The granting of the aid was a parliamentary proceeding. The tenants who were present were acting, not in their capacity of tenants in capite, in which capacity they could not bind those who were absent, but as legislators, passing a law which affected to bind everybody. A meeting of tenants in capite as such for the purpose of granting an aid is not known to have existed, and when this aid was levied twelve years later it is stated to have been granted "in pleno parliamento nostro": Rymer's Foedera, 1816 ed., vol. i., part ii., p. 945. A mere meeting of tenants in capite would never have been described as a Parliament. This Parliament then proceeded to pass statutes. Five statutes were passed, Quia Emptores, two statutes Quo Warranto, a statute De consultatione about prohibitions, and a statute Modus Levandi Fines, which prescribed the particular ceremonies to be adopted in levying fines. Quia Emptores appears first in the Statutes at large but last in the Parliament Roll. It was passed a week before the arrival of the Commons, but it would appear probable that the knights of the shire were summoned to consider a matter of such importance as this, affecting the holding and sale of land throughout the whole kingdom, and that it was approved by them before it finally received the Royal assent. That is the suggestion made in the Report on the Dignity of the Peer, vol. i., p. 201, although it does not seem to be warranted by the language of the statute itself. At this period it was thought that certain matters might be advanced by the nobles sitting without the Commons and that the Commons should then be summoned to give their consent. This view is supported by the form of the writs to the sheriff, which is inconsistent with the

contention of the Crown that there were two separate Parliaments, for the writ shows that the knights were summoned at the special request of some of the nobles in respect of certain grave matters for the purpose of consulting with the nobles and giving their determination thereon: Report on the Dignity of a Peer, vol. iii., p. 54. As regards the remaining statutes there is no evidence to show whether they were passed before or after the attendance of the Commons. It has never been decided that a Parliament is not a good Parliament for peerage purposes unless the nobles and the Commons are summoned on the same day. The sitting on May 29, even if Lord St. John had gone away and never attended afterwards, would be enough to show a sitting in Parliament because he sat in an assembly to which the knights were afterwards summoned and of which they formed part. But further it is a matter of irresistible inference that Lord St. John did sit in that assembly after the knights had joined it, for he was present at Westminster as a suitor on July 2, and when a peer has come up and sat in Parliament the presumption is that he goes on sitting in Parliament. As regards the authorities, the decision of Lord Cottenham is directly in point. It is clear from the terms of his judgment that Lord Cottenham must have read the account of this Parliament in the Report on the Dignity of a Peer, the first volume of which was published in 1820. It also appears from the transcript of the arguments in that case that the then Attorney-General clearly put the point that this grant of an aid was not a parliamentary proceeding, although he expresses his personal opinion that the point was not a good one. Lord Cottenham therefore gave his decision with all the facts before him, and it would be an extraordinary result that Lord Hastings should be admitted to the peerage and another claimant with exactly the same title should be excluded. Lord Cairns arrived at the same result in the *Mowbray and Segrave Peerage Claims*. In the *De Wahull Peerage Claim* (1892) Lord Selborne, referring to the decision of Lord Cairns, says that the proposition involved therein that the sitting of Nicholas de Segrave in the Parliament of 1290 vested in him a peerage was not open to doubt, although he reserved his opinion as to the correctness of Lord Cairns' decision

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with respect to the validity of the Parliament of 1283. In the *Fauconberg Peerage Claim* (1903) Lord Halsbury suggests that the assembly of 1283 must have been a Parliament because it passed the Statute De Mercatoribus, and he says that in each case the question whether an assembly is a Parliament or not must depend very much upon the particular facts relating to the particular assembly. Assuming that this Parliament of 1290 was not a Parliament containing the three estates of the realm, it may still be a Parliament for peerage purposes. In determining what is a Parliament prior to 1295, the date of the model Parliament, it is sufficient that it should be the national assembly constituted according to the particular procedure of the time: see Stubbs' Constitutional History, 4th ed., vol. ii., p. 236, par. 215. It has never been determined by your Lordships' Committee that to constitute a Parliament in the proper sense of the term you must import into the national assembly prior to 1295 all those elements which would have to be imported after that date, provided only that it is a representative assembly called in the manner customary at the time and is competent to deal with legislation and the granting of aids and subsidies. There is no rule of the Committee that during this period a Parliament must consist of representatives of the three estates of the realm. Further, it is not necessary to prove a sitting by record at all, and, although a mere succession of writs by itself cannot create a peerage, the cumulative effect of the evidence in this case relating to the first Lord St. John and his son is sufficient to show that at all material times they were peers of Parliament.

Raymond Asquith in reply. The question is not whether John de St. John was a baron, but whether he was a hereditary peer of Parliament—a very technical question to be decided according to certain artificial and it may be arbitrary principles laid down by your Lordships' Committee. It is not enough that the claimant should prove that his ancestor sat in an assembly which passed laws. Broadly speaking, the irreducible minimum of qualification is that there should be a sitting in an assembly which contains within it the three estates of the realm. In the *Hastings Case* (1) the question of the validity of this Parliament

(1) 8 Cl. & F. 144.

was very faintly argued, and Sir John Campbell made no reference to the fact that the Commons were not present on May 29 and did not seek to impugn the authority of that Parliament. In the *Mowbray and Segrave Case* it was unnecessary for the Committee to pass any judgment on the sitting in the Parliament of 1290, and it was assumed by the Attorney-General of the day that it was a valid Parliament. In the *De Wahull Case* an unsuccessful attempt was made to claim that a series of writs without any sitting at all would establish a peerage, and there also it was unnecessary to determine the validity of the Parliament of 1290. It is said (1.) that this meeting was called a full Parliament. (2.) that it passed statutes, and (3.) that the assembly was, so to speak, coloured by the subsequent presence of the knights of the shire and that a sitting at that assembly at any period of its existence must be presumed to be a sitting in Parliament. As to 1, the word "parliament" by itself at that time was an ambiguous term and there is no sufficient evidence to show that the expression "plenum parliamentum" was a term of art; indeed in the record on which the petitioner founds his claim the two expressions are used indifferently with reference to this very assembly. As to 2, there is no evidence that the statutes were passed before the arrival of the Commons, and the passing of statutes, though it is evidence to be taken into consideration, is not of itself sufficient to qualify the assembly as a Parliament in the peerage sense of the term. As to 3, there was an utter difference of quality between the assembly which met on May 29 and the assembly which met on July 15 which it is impossible to bridge, and in the material sense of the word Parliament did not meet till July 15. It is unsound to argue that the two estates which met in May constituted a Parliament because a third estate was at some subsequent date destined to be added to them. It is the co-existence in one assembly and at one time and for one purpose of the three estates of the realm which makes a Parliament. Then it is said by Mr. Cozens-Hardy that anything is a Parliament which is constituted according to the regular procedure of the time as a national assembly. In the first place it would be obviously irrational and inconvenient to say that a sitting in such an assembly could be the foundation of a claim to a seat in your

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Lordships' House, but, secondly, even on the claimant's hypothesis, having regard to the Parliaments of 1275 and 1295, this assembly was not a national assembly constituted according to the ideas of the time. It is generally agreed by historians that Edward I. created the House of Lords as well as the House of Commons and that he created them more or less pari passu; and seeing that the claimants in these cases are asserting the right to take part as hereditary legislators in Parliament, it is not unreasonable that the Parliament upon which the claim in any particular case is founded should be constituted essentially in the same way as a modern Parliament: Stubbs' Constitutional History 4th. ed., vol. ii., pp. 212, 213, par. 201.

The CHAIRMAN intimated that their Lordships' decision would be given at a later sitting.

July 8. LORD ATKINSON. My Lords, I regret that I have been unable to come to the conclusion which, I understand, has commended itself to the majority of your Lordships, but as I differ I think it right to state at length the reasons why I differ.

This case comes before your Lordships under a reference by His Majesty of a petition of Captain Francis William Forester claiming to be one of the coheirs to the Barony of Saint John, which is alleged to date back to the year 1283. No patent has been given in evidence to support this claim, and the existence of the barony descendible to heirs general is proposed to be established by proof of a (presumed) summons to, and a sitting in, Parliament, which in the *Vaux* (1), *Braye* (2), and *Camoys* (3) Peerage claims and some earlier authorities was held to be sufficient for that purpose.

In the first of these cases it was contended by Sir J. Campbell, the then Attorney-General, that the issue of a writ of summons was an exercise of the Royal prerogative operating as a conditional grant, the condition being that the grantee should take his seat in Parliament, and that upon his so doing his blood became ennobled and the peerage made descendible to his posterity.

(1) (1837) 5 Cl. & F. 526. (2) (1839) 6 Cl. & F. 757,
(3) (1839) 6 Cl. & F. 789,

Whether that be the correct theory, or whether a sitting is necessary because, as was suggested in the *Mowbray and Segrave Peerage Case*, a writ of summons might be set aside by a writ of supersedeas at any time before it was acted upon, and only became irrevocable when it had been acted upon by the person named sitting in pursuance of it, the proposition established by the above-mentioned authorities is not, and cannot be, successfully disputed. It has further been decided both in the *Vaux Case* (1) and the *Hastings Case* (2) that if a sitting in Parliament by a particular person as a peer be proved, it will be presumed that he sat in pursuance of a writ of summons, on the principle that omnia praesumuntur legitime facta donec probetur in contrarium.

A writ of summons, dated June 28 (11 Edward I.), 1283, was found in the Welsh Close Roll addressed to John de Saint John, the ancestor from whom the petitioner traces his descent, and a second writ from the English Close Roll dated September 21 (27 Edward I.), 1299, but though exhaustively searched for, no intermediate writ of summons was found. No sitting in Parliament in pursuance of either of these writs was proved, but an extract from the Rolls of Parliament, 18 and 19 Edward I. (1289—1291), of a memorandum was proved, in which the name of this John de Saint John appears immediately succeeding that of John de Hastings, and only separated by three or four names from that of Nicholas de Segrave.

The claimant contends that this document records a proceeding in a Parliament in which John de Saint John participated, and is therefore proof of a sitting in Parliament by him. The Attorney-General, on behalf of the Crown, contends (1.) that the proceeding recorded in it was not a proceeding in Parliament at all, but merely a grant made to the King on the occasion of the marriage of his daughter by some of his chief tenants in capite, and (2.) that while the grant purports to have been made in an Easter Parliament in the month of May, no knights of the shire were returned to that Parliament till July 15 following; that the third estate of the realm was therefore not represented when the alleged sitting by John de Saint John took place, and

(1) 5 Cl. & F. 526. (2) 8 Cl. & F. 144.

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that consequently the assembly, however described, was not a Parliament of such a kind that a sitting in it, even if a summons to it be presumed, would be adequate to prove a title to a peerage.

No proof has been given of any sitting in Parliament other than this by John de Saint John or any of his descendants. It is vital, therefore, to the petitioner's case that these objections should be ruled upon by your Lordships in his favour. Otherwise he must fail. Your Lordships, in consequence, determined that the proof of the pedigree should be postponed until you had an opportunity of considering and pronouncing upon the points thus raised by the Attorney-General.

The document on the Roll of Parliament professing to be a grant to the King is described as being made "in pleno parliamento ipsius domini regis." It gives the names of about twenty barons and lords as present, amongst whom are the three already mentioned, and then adds "et ceteri magnates et proceres tunc in parliamento existentes pro se et communitate tocius regni quantum in ipsis est concesserunt domino regi ad filiam suam primogenitam maritandam," &c.

Much reliance was placed by the Crown on the words "quantum in ipsis est." And it was contended they show that those who made the grant were aware that they could not bind, in addition to themselves, the communitas totius regni, on whose behalf, as well as upon their own, they professed to act. It is not shown, nor was it suggested, that any assembly of chief tenants in capite, as such, could bind any one but the individuals who assembled, or those who consented to be bound by what those assembled did. There was no representation amongst chief tenants in capite as such.

As legislators peers of the realm would be clothed with a representative character, but it would be strange indeed that chief tenants in capite should in their not representative character profess to act "pro se et communitate tocius regni." Whereas, if the assembly was the most complete assembly of the peers of the realm possible, acting as legislators, these qualifying words, "quantum in ipsis est," might well be introduced, since by Magna Charta it was, according to Blackstone, promised by the

King that he would summon all "archbishops, bishops, abbots, earls, and greater barons personally, and all other tenants in chief under the Crown by the sheriff and bailiffs, to meet at a certain place within forty days' notice, to assess aids and scutages when necessary" (May, Parl. Prac., 6th ed., p. 20). Well, the aid so granted was apparently not paid, at least in full, and one finds on the Roll of Parliament in the thirtieth of Edward I. a writ directed to the sheriff of Kent ordering him to levy the said grant. In this writ the assembly by which the aid was granted is described as composed of "prelati, comites, barones, et ceteri magnates de regno," and adds, "Concorditer per se, et tota communitate ejusdem regni, in pleno parliamento nostro."

One of the statutes passed in this Parliament at Easter, 1290, was the Statute of Quia Emptores, enabling every freeholder to sell his land. It runs: "Our Lord the King, in his Parliament at Westminster after Easter in the Quinzime of Saint John Baptist, at the instance magnatum regni sui granted that it should be lawful for every man to sell his land." The Quinzime of Saint John would be some time before July 15.

Writs tested on June 14, 1290, directed to the sheriff of Northumberland and the sheriffs of the other counties requiring them to return two or three knights of the shire would not be returnable till about July 15, 1290. The fact that the knights of the shire were not returned to Parliament till after this grant was made to the King, and also after the Statute Quia Emptores was passed, is, however, no new discovery. The Report of Lord Redesdale's Committee on the Dignity of a Peer, printed in 1820, which is now the common text-book, as one might style it, of which every one avails himself who has to take part in inquiries such as the present, at vol. i., p. 196, refers to the matter in the following terms: "The Statute Quia Emptores terrarum appears to have been made in the Parliament of Westminster, in the Quinzime of Saint John the Baptist, the day to which the Parliament appears by other proceedings to have been adjourned, but seven days before the writs above mentioned were returnable. The Parliament, therefore, must have assembled before the knights for the several shires could have been returned. But as the Parliament apparently continued sitting for some time after, the

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statute, though purporting to have been made 'ad instantiam magnatum regni sui' without expressing any concurrence of others, may have been actually made after the return of the writs and in the presence of knights of the shires elected according to the writs."

The several uses of the word "Parliament" were also well known. In division 8 of this same Report, p. 171, it is stated: "It is clear, however, that the word Parliament, in the reign of Edward the First, was not used only to describe a legislative assembly, but was the common appellation of the King's Great Court or Council; and that the legislative assembly of the realm (composed generally, in and after the 23rd of Edward the First (1295), of Lords Spiritual and Temporal, and representatives of the Commons) was usually convened to meet the King and his Council at one of those Parliaments."

If that be so, nothing could be more natural than that even before 1295, when representatives of the Commons were not regularly returned, the word "plenum" should have been added to the word "parliamentum" after the peers had been summoned to and had met the King and his Council in one of these so-called "Parliaments." Sir Robert Finlay challenged the Crown to produce a single instance in which the words "plenum parliamentum" were applied to an assembly which was nothing more than a mere meeting of the King's Great Council, and did not purport to act as a true Parliament for legislative or other business. And I think Mr. Cozens-Hardy has shown conclusively that from 1275 downwards, while many instances can be found where the expression "plenum parliamentum" was used to describe a true Parliament, where representatives of the Commons attended, in no instance, save possibly in that of the so-called Parliament at Shrewsbury of 1283, were these words applied to an assembly other than one purporting to be a legislative representative assembly with full powers. No instance at all was found where the word "Parliament" was used to describe a meeting of the chief tenants in capite of the Crown as such, and it is, I think, almost inconceivable that it should be so used.

Now, the above being the true nature of the information in the Report on the Dignity of a Peer, the *Hastings Peerage Case* came before a Committee of Privileges of your Lordships' House

in the year 1840-41, of which the then Lord Chancellor, Lord Cottenham, was a member. The case is most conveniently reported in 8 Cl. & F., p. 144. I have been unable to find who were the other members of that Committee. But Lord Cottenham had sat in the Committee of the *Vaux Peerage Case* (1), in which the law as to the creation of peerages by a writ, and a sitting in Parliament in pursuance of it, was elaborately discussed; and also in that of the *Braye Peerage Case.* (2)

Lord Cottenham, at pp. 159—160 of the Report, deals with this so-called Parliament of 1290 thus: "His son John de Hastings is, I think, clearly proved to have sat in Parliament in the 18th of Edw. I., but not proved to have been summoned to that Parliament. The sitting in Parliament must be proved by some proceeding in Parliament itself, and there is produced and proved, as of the date of the 18th Edw. I., in the year 1290, a document, professing to be in the nature of a grant to the King, described to be made 'in pleno parliamento ipsius domini regis,' which states the Barons and Lords present; and among others, Johannes de Hastings; and, after naming him and others, it says, 'et coeteri (3) magnates et proceres tunc in parliamento existentes.' The grant is stated to have been not properly a subject of a grant by Parliament; but whether the subject of a grant by Parliament or not, is, I apprehend, not material, provided it appears clearly that it was a proceeding in Parliament; and the document itself states that it was 'in pleno parliamento,' and states the parties present to have been, among others, 'Johannes de Hastings et coeteri (3) magnates et proceres tunc in parliamento existentes.' There is nothing to impeach this document as having been a proceeding in Parliament: it is, therefore, a parliamentary proceeding, recognising Johannes de Hastings as being then a member of your Lordships' House; and I apprehend it comes, therefore, within all the rules by which your Lordships try the fact of whether there has been a sitting."

The resolution passed by the Committee is to be found in *Lords Journals*, vol. 73, p. 296. It runs thus: "Resolved and adjudged that the Barony of Hastings was vested as a Barony

(1) 5 Cl. & F. 526. (2) 6 Cl. & F. 757.
(3) *Sic.*

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descendible to heirs general of the body of John de Hastings, who died in 1313, and that the said John de Hastings, Baron Hastings, was summoned to and sat in Parliament in the 18th of Edward the First." No writs to sit in this Parliament are enrolled and none were proved, but the decision in the *Vaux Peerage Case* (1), namely, that where a sitting is proved the issue of a writ of summons may be presumed, was followed.

This is a clear, distinct, and positive decision that the presence of John de Hastings in the assembly which made this grant, as one of its members, testified in the manner on the Roll of Parliament appearing, entitled him to a peerage. Unless it be erroneous, it conclusively establishes that the John de Saint John, from whom the petitioner traces his descent, was then also entitled to a similar peerage. This must mean that the assembly at Westminster at which this grant was made was not a mere assembly of tenants in capite, in that character, and in that character alone; but was an assembly of peers of Parliament, the fact of sitting in which established that the peers, who sat therein as peers, were entitled to that dignity. It cannot be pretended that this point was not ruled upon.

Lord Campbell was the then Attorney-General, and appeared as such in this, as well as in the *Vaux* (1) and *Braye* (2) Peerage cases, on behalf of the Crown. Then came the *Mowbray and Segrave Peerage Case* in 1876. Lord Cairns, who was then Lord Chancellor, sat on that Committee, as did also Lords Hatherley, Blackburn, and O'Hagan. A writ of summons to Nicholas de Segrave to the Parliament of eleventh of Edward I. (1283) at Shrewsbury was proved, and also a similar writ of summons to the Model Parliament, as it is called, of 1295, but none to the Parliament of 1290. The only sitting proved was a sitting in this Parliament of Westminster in 1290, and it was proved by the production of a copy of the Roll of Parliament relied upon in the present case, and not otherwise. The nature of the grant then made must have been before that Committee, as it was before the Committee in the *Hastings Peerage Case* (3), since it appears on the face of the document itself. The decision in the latter

(1) 5 Cl. & F. 526. (2) 6 Cl. & F. 757.

(3) 8 Cl. & F. 144.

case, and the speeches of Lord Cottenham in this and in the *Vaux* (1) Peerage cases, were referred to.

It was not suggested that the sitting in the Parliament of 1290 was not in itself sufficient to establish a title to a peerage. The whole struggle of the applicant was to throw back the existence of the peerage to the 49th of Henry III., as Nicholas de Segrave had received a writ of summons to attend that Parliament. The Crown relied upon the statute called the Dictum of Kenilworth, making void all "writings theretofore made by King Henry III. or Lord Edward his son by occasion of the troubles of the realm at the instance of Simon de Montfort Earl of Leicester and annulling all the acts of him Simon and his accomplices whether judicial or other."

The first resolution proposed on behalf of the petitioner for the adoption of the Committee was, "That the Barony of Segrave was an ancient Barony in fee." That was adopted.

The second ran thus: "That it is proved by the writ of summons addressed to Nicholas de Segrave in the 49th year of Hen. III. and other evidence adduced on behalf of the petitioner that the Barony of Segrave was in the reign of Hen. III. vested in Nicholas de Segrave."

In reference to this the Lord Chancellor said: "My Lords, there is not before your Lordships any proof, I mean any sufficient proof, that the barony was vested in Nicholas de Segrave in that year except it be the summons which is here mentioned. Unfortunately that writ of summons is, as it appears to me, one of those documents struck at and rendered null and void by the very strong words of the statute which was subsequently passed, called the Dictum of Kenilworth. . . . . It may perfectly well be that the Segrave Peerage has an origin as remote as that year the 49th Hen. III., or much more remote, but the fact established before your Lordships is this, that the first perfectly valid writ of summons which is proved before your Lordships is a writ of summons addressed to Nicholas de Segrave in the 11th of Edw. I. A sitting afterwards took place, and would be referred to that writ of summons, and, therefore, without at all closing the question, if it be a question worth raising as regards precedence, I should submit to your Lordships that the

(1) 5 Cl. & F. 526.

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proper course would be to resolve, 'That it is proved by the writ of summons addressed to Nicholas de Segrave in the 11th year of Edw. I., and the other evidence adduced on behalf of the petitioner, that the Barony of Segrave was in the reign of King Edward I. vested in Nicholas de Segrave.' That does not at all negative the fact, if it be a fact, that it was vested in that person, or one of his ancestors, even anterior to that time."

Now this resolution and the passage of Lord Cairns' judgment dealing with it were criticized in the *De Wahull Peerage Case*, the Committee on which sat in June, 1892. It was a particularly strong Committee. The Lord Chancellor, Lords Selborne, Watson, Macnaghten, Morris, Field, and Hannen, in addition to the Earl of Morley, sat upon it.

Writs of summons to the ancestor, through whom the claimant claimed, to sit in the so-called Parliament of 1283 and 1290 were proved, but no sitting was proved. Lord Selborne guarded himself against being taken to acquiesce in the view that the assembly of 1283 was a true Parliament, but there was not a suggestion that the Parliament of 1290 was not a true Parliament; Lord Selborne described it as "a regular and undoubted Parliament." He pointed out that the resolution in the *Segrave Case* did not affirm the former proposition; that it only affirmed that the Barony of Segrave was in the reign of Edward I. vested in Nicholas de Segrave; that "as Nicholas de Segrave sat in the Parliament of the eighteenth year of the reign of that King that proposition was open to no doubt." He further stated that he did not believe Lord Cairns could have meant that the sitting of 1290 could be referred to the summons of 1283.

It would appear to me to be a most violent presumption that all these noble and learned Lords were ignorant of the fact, discussed at such great length in the Report on the Dignity of a Peer, that the knights of the shire were not returned to Parliament till the month of July, 1290, some time after the grant to Edward I. was made. It would have been the duty of Lord Campbell in the *Hastings Case*, if aware of the defect, to have called attention to their absence if he considered it was, as is now contended, a fatal objection to the petitioner's claim. A similar duty rested upon the Attorney-General in the *Mowbray and*

Segrave Case, and again possibly in the *De Wahull Peerage Case*. All these distinguished personages, if the contention of the Crown in this case be sound, were strangely remiss in the discharge of their duties, or strangely ignorant of the common facts of history upon which the cases in which they appeared depended. And this though laborious research was not needed to obtain the requisite information. It was ready at hand. It is in this way, and only in this way, that the fact can be accounted for that in no case to which your Lordships have been referred is it even suggested either that it was necessary to prove that representatives of the third estate had in fact been returned to Parliament before a sitting in Parliament by a particular person took place, which, together with a writ of summons, was held to be sufficient to establish that person's title to a peerage, or that the proof of the non-return of representatives before that event made such a sitting of no avail.

According to our modern ideas, no doubt, the word "Parliament" is used to denote an assembly in which the third estate of the realm is represented on settled principles in fixed numbers and according to positive laws; but nothing could be more misleading than to apply those notions to assemblies called into existence over six centuries ago. The creation of peers of Parliament is effected by the will of the Sovereign in the exercise of his Royal prerogative. He may express that will through Letters Patent or by the issue of a writ of summons to the person named to attend and act in an assembly in which peers of Parliament, and only peers of Parliament, can take part under the authority of writs of summons of this kind. Representatives of the third estate are returned to that assembly, under writs addressed not to them, but to the sheriffs or other returning officers. It does not appear to me that it necessarily follows that the will of the Sovereign is exercised less effectively because those other persons are not returned to serve in that assembly by an entirely different process, and by virtue of an entirely different right, if only it be clear that the intention of the Sovereign was to summon to an assembly which he designed and intended to act and be regarded as a Parliament, with the full rights and power of a true Parliament,

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One has only to refer to such a well-known book as May's Parliamentary Practice to find collected in the notes the authorities which show what were the steps in the gradual evolution of our present parliamentary institutions. At p. 19 it is stated that William the Conqueror in the fourth year of his reign summoned, by the advice of his barons, a council of noble and wise men learned in the law of England. Twelve to be returned out of each county "to show what the customs of the kingdom were." Lord Hale said that this was "as sufficient and effectual a Parliament as ever was held in England" (1 Hale's History of the Common Law, 202).

In the fifteenth year of King John (1213) a writ was directed to the sheriffs of each county "to send four discreet knights to confer with us concerning the affairs of our kingdom." No indication is given whether these knights were to be elected or selected at pleasure by the sheriff (Palgrave's English Commonwealth, chap. 9).

In the thirty-eighth year of Henry III. writs were issued to the sheriffs of each county for a particular occasion to "cause to come before the King's Council two good and discreet knights whom the men of his county shall have chosen for this purpose in the stead of each and all of them to consider what aid they will grant to the King." In 1261 writs were apparently directed to the sheriffs requiring them to cause knights from each county to repair to the King at Windsor, but whether to be elected or selected by the sheriffs is not clear (2 Prynne's Register).

It is no doubt true that in 1265 writs were directed by Simon de Montfort, while he held the King as a prisoner, to the sheriffs, directing them to return two knights for each county and two citizens and burgesses for each city and borough, but this was the act of a rebel and was declared to be null and void and of none effect by the Dictum of Kenilworth. It forms no precedent. The writs were also directed to the sheriffs in the eleventh of Edward I. (Table of Writs—Report on the Dignity of a Peer, vol i., p. 489; Palgrave's Parliamentary Writs (1827)).

The writs of which that given in evidence in the present case is one were the next in time. But it is expressly stated that these writs were issued at the request of the magnates et proceres,

and it is left entirely optional with the sheriffs whether they should return two knights or three for each county.

In the twenty-fifth of Edward I. the so-called Model Parliament was constituted, and it was by the statute then passed De tallagio non concedendo declared that no tallage or aid should be taken or levied by the King "without the good will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and freemen of the land." This statute securing to the Commons the right to tax themselves, and the subsequent statute of the thirteenth of Edward II. (1322) securing to them the right to take a part in all legislation, would appear to me to be the earlies authorized attempts to shape and fashion our parliamentary constitution as now understood. But there is, I think, nothing to show that before the twenty-fifth of Edward I. (1295) any fixed system of representation of the Commons in Parliament was established, or that it was, according to the custom then existing, or the ideas then prevailing, considered that this representation was in a legal or constitutional point of view necessary to the valid composition of a Parliament.

The frame of the writs for the return of knights of the shire to the Parliament of 1290 goes to show this. There was no intention, apparently, on the part of the King to summon them till it was suggested to him by the magnates. It would appear to me, therefore, that a writ directed by the King to an individual, summoning him to sit in an assembly designated by the King as a "plenum parliamentum," to which he did not require, and did not intend to require, representatives of the Commons to be returned, followed by a sitting in pursuance of that writ in that assembly, was, at this time, quite as effectual to confer the dignity of a peerage as if the Commons had, when the member so summoned sat, been represented according to some of the loose, irregular, and arbitrary methods theretofore adopted.

The conclusion to be drawn from an examination of the transactions of the earlier years of the reign of Edward I. is thus summed up in the Report on the Dignity of a Peer, p. 197: "Taking the whole of this transaction it tends strongly to show that the constitution of a Legislative Assembly for all purposes was not then clearly established as it now is; and that the election of

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Knights, Citizens, and Burgesses, and Barons of the Cinque Ports, to represent shires, cities, and boroughs, and the Cinque Ports, according to the form of the writs issued in the 49th of Henry the Third, was not in the 18th of Edward the First deemed essential to the constitution of a legislative assembly in Parliament."

I cannot believe that if the non-representation, or defective representation, of the Commons in Parliament was considered by those who represented the Crown to be fatal to the petitioner's claim, both in the *Hastings Peerage Case* (1) and the *Mowbray and Segrave Peerage Case*, they would have so failed in their duty as not to have raised the point, and have allowed the Committee which dealt with these cases to report in favour of obviously invalidly created peerages. I cannot assume that either they or the distinguished judges who sat on these Committees were ignorant of some of the well-known and common facts of the constitutional history of England dealt with in about fifty pages in such a familiar book as Hallam's Middle Ages (8th ed., vol. ii., pp. 146—200).

I think the examination of documents and the investigation of events over six centuries old should not be approached with an inclination to find in every ambiguity, omission, or informality a defect proving invalidity, but rather dealt with on the rational principle embodied in the maxim I have already quoted. No doubt committees of your Lordships' House such as this Committee are not bound by preceding decisions as are Courts of law but still it surely is desirable that some stable principle should be followed and some consistency, where possible, secured in the conclusions which are, from time to time, arrived at. Speaking for myself, I feel quite unable to disregard all those precedents, and to adopt a conclusion unsupported by a single authority, simply because it is, in effect, said to be the only conclusion consistent with what parliamentary institutions according to our modern notions ought to be, the more especially as I think it involves the necessity of determining what kind of representation of the Commons in Parliament was an adequate or proper representation of them in the year 1290. I do not

(1) 8 Cl. & F. 144.

think it is enough to say that the King then designed that the Commons should be represented in a particular way, and that they were not represented even in that way until after the ancestor of the petitioner had sat, unless it can be shown, in addition, that their representation in some way was then considered essential to validity, which in my view it has not been shown to be.

In my opinion, therefore, the petitioner has shown that the Barony of St. John was vested in John de Saint John in the eighteenth year of the reign of Edward I.

LORD PARKER OF WADDINGTON. (1) My Lords, the principles on which this Committee acts when it has to consider whether the existence of an alleged barony has been established admit of no doubt. Leaving out of account the case of Letters Patent from the Crown, it is well settled that a barony can only be established by proof of a Royal writ summoning some ancestor of the claimant to attend a Parliament followed by an actual sitting by such ancestor in the Parliament to which he was summoned. It is also well settled that while proof of such a writ raises no presumption that the person summoned actually sat, proof, on the other hand, that a person sat in a Parliament will raise a presumption that he sat by virtue of a Royal writ summoning him to it. But the Parliament to which the claimant's ancestor was summoned and in which he sat must have been a Parliament in the more modern sense of the word; that is to say, it must have conformed in its more essential characteristics to what is called the Model Parliament of 1295.

Parliament in the modern sense of the word developed out of earlier conditions. In essential particulars it took its final form under Edward I. in the Parliament of 1295. There may have been Parliaments before 1295 so nearly resembling the Model Parliament of that year that a writ of summons to, followed by a sitting in, some or one of them would be accepted by your Lordships as proving the existence of a barony, but each case must be considered on its merits. In the *Fitzwaryn Case* this Committee was not satisfied that the Shrewsbury Parliament of

(1) Read by Lord Dunedin.

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1283 was such a Parliament. The mere fact that it passed what was subsequently recognized as a statute was held to be insufficient. Though a matter of weight, it did not outweigh the absence of the clergy and the other matters in which the Shrewsbury Parliament differed from the 1295 model.

My Lords, there appears to be good reason for each of the principles to which I have referred. The power to create an hereditary dignity is part of the prerogative of the Crown, and from this arises the necessity of a Royal writ. Such a writ, till acted upon, can be superseded, and therefore proof of a sitting in Parliament pursuant to it is also necessary. It must be remembered too in this connection that the House of Lords has always exercised the right of scrutinizing the title on which a claim to a peerage is based and seeing that all formalities and precedents have been duly observed. Finally there is good reason to suppose that Edward I., the founder of Parliament in the modern sense of the word, did not consider himself bound to summon as peers of Parliament all those who had theretofore attended his councils under the name of barones proceres or magnates, so that the dignity of a peer of Parliament must depend on the nature of the assembly to which the claimant of such a dignity had been summoned and in which he had taken part.

My Lords, in the present case the claimant seeks to establish the existence of an ancient barony of Saint John in the following way. He asks the Committee to find, on the strength of an entry in the Parliament Roll (Exchequer Series) for the year 1289-90, that his ancestor John de Saint John sat in a Parliament held in the year 1290, and to presume from such finding that he was summoned to this Parliament by Royal writ. There exists a writ summoning John de Saint John to the Parliament of 1283 and another writ summoning him to the Parliament of 1299, and there are numerous writs summoning his son and heir to various Parliaments in the reigns of Edward I., Edward II., and Edward III., but the claimant admits his inability to prove any sitting in Parliament by any of his ancestors, unless it be a sitting by John de Saint John in a Parliament of 1290, and he asks your Lordships to presume a writ of summons from this sitting if your Lordships hold it to be proved.

My Lords, we know a good deal of the history of the year 1289-90. There were at least three so-called Parliaments in that year. One was held before Easter and one after Michaelmas. There is no evidence that the Commons were represented in either of these Parliaments. Prior to 1295, assemblies called Parliaments, in which the Commons were unrepresented, were quite common. Even in 1295 there was such a Parliament before the Model Parliament of that year was convened. Assemblies in which the Commons were unrepresented, though called Parliaments, have never been recognized as Parliaments for peerage purposes.

It is also quite certain that after Easter Edward I. convened an assembly called a Parliament to which the knights of the shires were not summoned, or at any rate were not summoned in the first instance. It is to this assembly that the entry on the Parliament Roll (Exchequer Series) to which I have referred relates. It appears therefrom that it was an assembly of barons and bishops only, and that on May 29 it proposed to grant to the King an aid to marry his eldest daughter amounting to a larger sum per knight's fee than the King could, having regard to the provisions of the Great Charter, levy on his own authority. The persons present are said to act "in pleno parliamento" and "quantum in ipsis est" to act for the whole community.

It is quite certain from this entry that even the expression "plenum parliamentum" was used of assemblies in which the Commons were not represented, and this is also abundantly clear from the researches of Professor Maitland referred to by the Attorney-General in his argument. The use, therefore, of the expression "plenum parliamentum" cannot be relied on as showing that the assembly to which it is applied is a Parliament for peerage purposes; and further, inasmuch as the aid was leviable only on tenants in capite, the entry is quite consistent with the assembly being an assembly of such tenants called for the express purpose of granting the aid. The writ convening it need not necessarily have been a writ summoning its members to any Parliament at all.

My Lords, our knowledge of what happened does not rest with the entry in question. A fortnight later, on June 14, the

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King issued writs to the sheriffs of the counties for the election and return to Westminster of two knights for each shire. The writs say nothing about the cities or boroughs, but with this and some minor variations they may be taken as substantially similar to the writs for the election and return of the knights of the shires to the Model Parliament of 1295. There is no record of any writ summoning either the nobility or the clergy. We find, however, that on July 8, before the return of the writ for the election of the knights of the shires, the King, on the advice of the magnates, enacted the Statute Quia Emptores, which may have been, and probably was, subsequently accepted by the Commons.

Two alternatives seem possible. Either writs were issued summoning the earls, barons, and bishops, and possibly the clergy, at or about the same time as the writs for the return of the knights of the shires, or else the existing assembly which granted the aid on May 29 may have continued as a constituent part of a new Parliament. If the former alternative be adopted, there is no proof of any sitting by John de Saint John from which a writ summoning him to sit can be presumed. The latter alternative seems the more favourable to the claimant, but even on this hypothesis it is, I think, impossible to presume, from a sitting on May 29 in an assembly which was clearly not a Parliament for peerage purposes, that the person who so sat continued to sit after this assembly had become a constituent part of a larger assembly which may possibly have been a Parliament for peerage purposes. Whether, after the return of the knights of the shires, there was any such Parliament, I do not propose to consider, finding, as I do, no satisfactory proof that John de Saint John sat in it at all.

My Lords, it appears that in the case of claims to peerages this Committee has always refused to be bound by former decisions. Strictly speaking, it is therefore unnecessary to refer to the *Hastings Case* (1) or the *Segrave Case*. Any opinion, however, expressed by such great authorities as Lord Cottenham and Lord Cairns cannot but have great weight. It is satisfactory to find on reference to these cases that the various facts and

(1) 8 Cl. & F. 144.

considerations to which I have above referred, though no doubt available for reference, had the Attorney-General of that day thought fit to refer to them, were not, in fact, brought to the notice of the noble Lords who then constituted this Committee. Nothing, therefore, that was said or decided in these cases has any real bearing on the questions your Lordships have to decide.

No doubt, it may at first sight seem anomalous that the Hastings Peerage was established on the same evidence as that which the Attorney-General asks your Lordships to hold insufficient to establish any barony of St. John; but it must be remembered that our knowledge and appreciation of the history of the thirteenth and fourteenth centuries is, as the result of modern research, very different from what it was in the past, and while, on the one hand, as in the present case, a refusal to be bound by older decisions appears to operate harshly with regard to the individual claimant, it may, on the other hand, in other cases operate in his favour.

My Lords, having regard to all the facts of the case, the resolution I should propose for the acceptance of the House is to the effect that there is no sufficient evidence of the existence of any ancient barony of Saint John, and if your Lordships accept this resolution it is unnecessary to go into any evidence as to the claimant's pedigree.

LORD PARMOOR. My Lords, I have come not without hesitation to an opposite conclusion to that of Lord Atkinson.

The sole question at present in debate before your Lordships is whether an assembly, at which John de Saint John was present, on May 29, 1290, was so constituted that presence thereat is a sitting in Parliament from which a writ of summons may be assumed as the foundation of a claim to an hereditary peerage. Was the meeting that of an assembly or council called together for consultation with the King, or was it a Parliament in the later sense of the word, constituted in substantial accord with the Model Parliament of 1295? It is important in this connection to bear in mind the principle on which a claim to a peerage, based on a writ of summons followed by an actual sitting in Parliament, is founded. Until a writ of summons has been

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followed by an actual sitting in Parliament, the Crown has power to supersede; but after an actual sitting the peerage is established and the power of supersession is no longer within the prerogative of the Crown. Hence to establish a peerage claim on proof of a sitting, from which a writ of summons may be assumed, the sitting must be in a Parliament in the later sense of that word, and something more than presence in an assembly or council called together for consultation with the King. In earlier times, during the period of constitutional transition, the word "Parliament" was applied to assemblies or councils as well as to Parliament in the later sense, but a sitting at such assembly or council would not affect the prerogative of the Crown or establish an hereditary peerage.

At the assembly on May 29, 1290, "in pleno parliamento," a feudal aid was granted on the marriage of the King's eldest daughter of 40*s.* for each knight's fee. There were present certain bishops, Edmund the King's brother, certain earls and magnates and proceres "tunc in parliamento existentes," among whom John de Saint John is mentioned by name. The aid was granted by those present "pro se et communitate tocius regni quantum in ipsis est," although no representatives of the Commons were present. There is no allegation that the terms of the Great Charter were infringed or that the presence of the Commons was a necessary condition to the grant of a feudal aid. The aid was in fact not levied until after an interval of some years. On June 14 the King issued a summons to the sheriffs "tibi praecipimus quod duos vel tres de discretioribus, et ad laborandum potentioribus, militibus de comitatu sine dilatione eligi" to meet at Westminster on July 15, with full power on behalf of themselves and the whole county "ad consulendum et consentiendum pro se et communitate illa hiis quae comites barones et proceres praedicti tunc duxerint concordanda." On July 8, before the date at which the knights of the shire had been summoned to attend, the King "in suo parliamento ad instantiam magnatum sui regni," published the important Statute of "Quia Emptores." This enactment, which affected landowners only, was therefore published without the previous assent of the knights of the shire, though this assent may subsequently have been given.

My Lords, the Attorney-General, on behalf of the Crown, advised that an assembly to which one of the estates had not been summoned, and which did not in substance comply with the constitution of the Model Parliament of 1295, was not such an assembly that a writ of summons on which to found a claim for an hereditary peerage could be assumed from a sitting thereat, and that the assembly was a meeting in council for the purpose of granting a feudal aid. On the other hand, it was argued on behalf of the claimant that there were adequate indicia to prove that the assembly was a Parliament as distinguished from a council; that it was not necessary that the three estates should be summoned to meet at the same time; that, in any event, it was sufficient if the assembly was a national council properly convoked according to the procedure then prevalent; and, lastly, that the matter had already been decided in the *Hastings Case* (1) and in the later cases of *Segrave* and *De Wahull*. It is necessary to consider separately each of these points.

The special indicia which are said to prove that the assembly was such a Parliament that a writ of summons, and a subsequent sitting, would found a claim to a hereditary peerage are the use of the words "in parliamento" and "in pleno parliamento" and the enactment of the Statute "Quia Emptores." These indicia are important evidence in favour of the claimant, but cannot be accepted as conclusive. The word "Parliament" appears to have been first used in England by Matthew Paris in 1246, having been used previously by continental writers. During the period of constitutional transition in the reigns of Henry III. and Edward I. the word "Parliament" had not acquired the final definite meaning of later history. It was applied to meetings of the National or King's Council, and did not necessarily denote either that the three estates were present or that the assembly was in substance constituted in accordance with the Model Parliament of 1295.

I had for some time much hesitation as to the effect of the epithet "plenum" prefixed to "parliamentum." In my opinion, however, it denotes, not that a Parliament and a full Parliament

(1) 8 Cl. & F. 144.

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are bodies of different constitution, but that there is a full meeting of the assembly, whatever may be the nature of its constitution. In this instance the expressions "in parliamento" and "in pleno parliamento" are used in the same document and applied to the same assembly, and at a date when there is no proof that there was any present intention to issue the writs of summons to the sheriffs. In further illustration of the varying use of the words "plenum parliamentum" at this date, the Attorney-General referred your Lordships to Maitland, Memoranda de Parliamento 1305. On February 28, 1305, a Parliament was summoned, following the precedent of 1295, and the three estates met the King and his Council. This assembly was kept together for three weeks. On March 21 a proclamation was made to the archbishops, bishops, and other prelates, earls, barons, knights, citizens, and burghers in general that they might go home. The King remained at Westminster with his Council, and this assembly was said to be in session as a "plenum parliamentum" or a "generale parliamentum" as late as April 5 and 6, although at that time it had ceased to be in any sense a representative body comprising the three estates. No doubt the words "plenum parliamentum" are accurately applied to a Parliament constituted on the model of 1295, but this is no proof that they were not during the period of constitutional transition also applied to any meeting of the Council which the King consulted in ordinary course on matters of national concern.

Assuming that the Statute "Quia Emptores" was passed by the King "in suo parliamento ad instantiam magnatum sui regni" before the arrival of the knights of the shire, it is consistent with the use of the word "Parliament" as denoting a meeting of the King and his Council without the implication of any representative element. At this date the King was held competent to pass a statute with the counsel and consent of his magnates, as is shown by many statutes which have found their way into the Statute Book. The Provisions of Merton (20 Henry III.) is an instance in the reign of Henry III., and among the numerous instances in the reign of Edward I. are included the Statute of Mortmain (4 Edward I.), the Statute De

Mercatoribus (6 Edward I.) and the Statute of Westminster the Second (13 Edward I.). There is not much trace of legislative power in the Commons in the reign of Edward I., and less trace of any initiative power of legislation.

It was further argued on behalf of the claimant that an assembly is not the less a properly constituted Parliament because the three estates are summoned to meet at different dates and that the subsequent issue of the writs to the sheriffs, and the attendance of the knights of the shire, had a retroactive effect in giving a representative character to the assembly of May 29, 1290. In this instance, however, there was an interval of time between the meeting of the assembly and the issue of the writs to the sheriffs. It is not a case of one assembly summoned to meet at different times, but a meeting of prelates, magnates, and proceres, to which at a later date, and possibly under a new summons, a third estate was added. If the co-existence of the three estates at the date of a sitting from which a writ of summons should be assumed as a foundation of a peerage claim is in some form necessary, this condition was not fulfilled. On the other hand, if such co-existence is not necessary, the case for the claimant would be at least as strong if no subsequent writs had been issued. There is an additional difficulty in the way of assenting to the above argument. A sitting in Parliament does not in itself constitute a valid ground for a peerage claim, but it has been held that from such sitting the necessary writ of summons may be assumed. At the time of the meeting, May 29, 1290, there is no proof that there was any present intention to summon the representative knights of the shires, and in the absence of such evidence I can see no sound reason for inferring that any person present at such sitting would be an intruder unless he had received a writ of summons to a Parliament.

The last point to which it is necessary to refer, before coming to the authorities, is the argument which was used by Mr. Cozens-Hardy on behalf of the claimant, that prior to the date of the Model Parliament of 1295 it is sufficient for the claimant to prove a sitting in a national assembly properly convoked according to the procedure prevailing at the time, and that

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the assembly of May 29, 1290, was such an assembly. No authority was cited in favour of so wide a proposition, and to sanction it would introduce a new principle highly inconvenient in the consideration of peerage claims.

The decision of the Committee of Privileges as to the advice it shall give upon one particular claim of peerage does not resemble the decision of the House sitting as the tribunal of final appeal upon a question of law in a suit between two adverse parties. Although such decision is not a judgment of binding authority, it will always be entitled to respect and consideration as an opinion expressed by those who are exercising a quasi-judicial function after argument and consideration.

I should hesitate to differ from the authority of the cited cases were it not clear that the particular issue raised before the Committee by the Attorney-General had not really been in debate on the former occasions. I cannot find that the attention of the previous Committees was called to the varying use of the words "parliamentum" and "plenum parliamentum" during the period of constitutional transition, or that any argument was addressed to such Committees against the acceptance of these words as conclusive proof that a sitting in an assembly so designated was a sitting from which a writ of summons to a properly constituted Parliament might be assumed. All the material facts connected with the assembly of May 29, 1290, are set out in the Report on the Dignity of a Peer, but the issue raised before this Committee does not depend upon any criticism of fact, but on the further light which has been thrown on the use of the words "parliamentum" or "plenum parliamentum" by subsequent historical research. An extract from the judgment of Lord Cottenham in the *Hastings Case* (1) clearly indicates that the issue now raised was not present to the mind of the tribunal, and it would be quite irrational to accept as an authority an opinion expressed on a point which had not been raised and which was not argued. The extract from the judgment of Lord Cottenham is as follows: "The sitting in Parliament must be proved by some proceeding in Parliament itself, and there is produced and proved as of the date of the 18th

(1) 8 Cl. & F. 144.

Edw. I., in the year 1290, a document, professing to be in the nature of a grant to the King, described to be in 'pleno parliamento ipsius domini regis.' . . . . The document itself states that it was 'in pleno parliamento,' and states the parties present to have been, among others, 'Johannes de Hastings, et coeteri magnates et proceres tunc in parliamento existentes.' There is nothing to impeach this document as having been a proceeding in Parliament: it is, therefore, a parliamentary proceeding, recognising Johannes de Hastings as being then a member of your Lordships' House; and I apprehend it comes, therefore, within all the rules by which your Lordships try the fact of whether there has been a sitting. This has not been or pretended to be the great difficulty in the present case; but the difficulty is, that there is or is not proof produced of the summons to that Sir John de Hastings to sit in that Parliament."

In the two further cases cited of *Segrave* and *De Wahull*, the issue as to the meaning of the words "parliamentum" or "plenum parliamentum" appears to have been neither argued nor considered on the matters brought before this Committee by the Attorney-General. Even if the House is sitting in its judicial capacity the decision of the House on a point which has not been presented to it is not a binding authority.

In the recent case of *Howley Park Coal, &c. Co.* v. *London and North Western Ry. Co.* (1), the Lord Chancellor, referring to an earlier decision which had been quoted in argument, said, "I cannot regard that decision as an authority for the proposition that the sections apply to land outside the limit. The question whether the sections applied beyond the limit was not one that was present to the mind of the House, so far as one can discover from an examination of the terms of the judgments and of the arguments; and I do not think that a decision of this House on a point that was not presented to it can, from mere implication of general words, be relied on as laying down a proposition which is of binding authority."

My Lords, in my opinion, the claimant has failed to show that there was created any such barony of St. John as he alleges,

(1) [1913] A. C. 11.

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and it is unnecessary to proceed further in the consideration of the pedigree of the claimant.

LORD HYLTON. My Lords, I wish to express my emphatic agreement with the opinion arrived at by Lord Atkinson.

LORD SHEFFIELD. My Lords, I concur in the two judgments of the noble Lords who recommended that this claim should not be agreed to. I do not wish to state anything more than that I agree in substance with the argument on which that recommendation is based.

The CHAIRMAN. I desire to say that I concur with Lord Parker of Waddington and Lord Parmoor. The Committee of course will report to the House in accordance with the recommendation of the majority.

Resolved that it is the opinion of this Committee that the claimant Francis William Forester has failed to show that there was created any such barony of St. John as he alleges. Report of the Committee agreed to by the House and resolved and adjudged accordingly.

Lords' Journals, July 13, 1914.

Solicitors for the petitioner : *Kennedy, Ponsonby, Ryde & Co.*
Agent : *H. Farnham Burke, C.B., C.V.O.*
Solicitor for the Crown : *Solicitor to the Treasury.*

NOTE.

PARLIAMENT ROLL (EXCHEQUER SERIES).

18 TO 19 EDWARD THE FIRST.

Placita coram ipso domino rege et ejus consilio ad Parliamenta sua post festum Sancti Hillarii et eciam post Pascha anno regni regis Edwardi filii regis Henrici decimo octavo.

Concessio facta domino regi ad filiam suam maritandam. } Memorandum quod in crastino Sancte Trinitatis anno regis decimo octavo in pleno parliamento ipsius domini regis Robertus Bathoniensis et Wellensis

Antonius Dunolmensis Johannes Wyntoniensis Thomas Menevensis Radulfus Karlliolensis episcopi et Willelmus electus Eliensis Edmundus frater domini regis Willelmus de Valencia comes Penebrokie Gilbertus de Clare comes Gloucestrie et Hertfordie Johannes de Warenna comes Surrie Henricus de Lacy comes Lincolnie Humfridus de Bohun comes Herefordie et Essex Robertus de Tipetot Reginaldus de Grey Johannes de Hastinges Johannes de Sancto Johanne Ricardus filius Johannis Willelmus le Latymer Rogerus de Monte Alto Willelmus de Brewose Theobaldus de Verdun Walterus de Huntercumb Nicholaus de Segrave et ceteri magnates et proceres tunc in parliamento existentes pro se et communitate tocius regni quantum in ipsis est concesserunt domino regi ad filiam suam primogenitam maritandam quod ipse dominus rex percipiat et habeat tale auxilium et tantum quale et quantum dominus Henricus rex pater suus percepit et habuit de regno ad filiam suam videlicet sororem domini regis nunc regi Scocie maritandam et licet idem dominus Henricus rex tempore illo ad predictum auxilium plenarie non percepit de quolibet feodo militari nisi tantummodo duas marcas vel parum plus predicti tamen prelati comites barones et proceres concesserunt quod dominus rex percipiat et habeat de quolibet feodo militari quadraginta solidos hac vice plenarie et integre, ita tamen quod alias non cedat eis in prejudicium vel consuetudinem et ita quod istud auxilium nunc concessum levetur eodem modo quo predictum auxilium domino Henrico regi concessum ut predictum est levabatur etc.

[PRIVY COUNCIL]

J. C.* 1914

May 14, 26. *Nov.* 6.

MILDRED HOWARD . . . . . Appellant;

AND

WILLIAM MILLER AND ANOTHER . . . . Respondents.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British Columbia—Registration of Land Titles—Absolute Fee—Charge—Specific Performance—Rectification of Register—Land Registry Act (Stat. of Brit. Col., 1906, c. 23), ss. 24, 29, 75.

The registered owner under the Land Registry Act (Stat. of Brit. Col., 1906, c. 23), s. 15, of an "absolute fee" in certain land in the Province entered into an agreement to sell it to the first respondent, who thereupon registered himself under s. 25 of that Act as owner of a "charge" upon the land. The appellant claimed to be and, unless precluded by the Act, was entitled to the land under an unregistered conveyance made by the vendor before registration of the "absolute fee." The respondents (the second respondent being a sub-purchaser) claimed specific performance of the agreement of sale against the vendor and the appellant, and the latter counterclaimed for a declaration of her title and for rectification of the register. At the trial the unregistered conveyance was put in and evidence was given that the vendor in an affidavit, and by verbal testimony in previous proceedings, had admitted the title of the appellant; the vendor did not defend the counter-claim:—

Held, (1.) that the respondents were not entitled to a decree for specific performance against the appellant as she was not a party to the agreement of sale; (2.) that the prima facie title of the vendor, under s. 24 of the Act, as registered owner of an "absolute fee" could be rebutted by her admissions of the appellant's title, although by reason of s. 75 the unregistered conveyance was not admissible for that purpose; (3.) that the purchaser was in effect merely the registered owner of an interest commensurate with that which equity would decree by way of specific performance and that the appellant was entitled to adduce the unregistered conveyance as a material circumstance in deciding whether specific performance should be granted; (4.) that, consequently, specific performance should not be decreed against the vendor and that the appellant was entitled to a declaration of her title and to rectification of the register.

Appeal from a judgment of the Supreme Court of Canada (May 28, 1913) dismissing, owing to an equal division of opinion,

* *Present:* Lord Moulton, Lord Parker of Waddington, and Lord Sumner.

a judgment of the Court of Appeal for the Province of British Columbia (November 8, 1912) which affirmed the judgment of Murphy J. at the trial.

The appeal raised important questions as to the effect of the provisions of the Land Registry Act (Stat. of Brit. Col., 1906, c. 23). The material sections of that Act are set out in the judgment of their Lordships.

The action was brought by the respondents against Mary Jane Sheard and the appellant for specific performance of an agreement made between the respondent Miller and MaryJane Sheard for the sale to him of 4·14 acres of land in the Province. The defendant Mary Jane Sheard did not defend the action, but the appellant (her infant daughter by a former marriage) by her defence alleged that the land formed part of the estate of her deceased father; that, subject to her mother's right of dower, it descended to her, and that her mother had no authority to sell it. The appellant, while resisting specific performance, counter-claimed a declaration of her title and rectification of the register. Mary Jane Sheard did not plead to this counter-claim.

The facts were as follows: By a deed dated August 23, 1893, six acres of land, including the land in dispute, were conveyed to Harry Howard, deceased, and his wife, now Mary Jane Sheard. This deed was registered under the Land Registry Act then in force.

By a deed dated June 14, 1905, Harry Howard conveyed his undivided half share in the land to his wife, and by a second deed of the same date she conveyed 4·14 acres (the land in dispute) back to him. Neither of these deeds was registered at the time. Harry Howard died intestate in March, 1906, leaving him surviving his wife, now Mary Jane Sheard, and a daughter, the appellant Mildred Howard. In May, 1906, Mary Jane Sheard applied for administration of her husband's estate, and included the 4·14 acres in her sworn inventory as part of that estate.

On July 30, 1907, Mary Jane Sheard took both deeds of June 14, 1905, to the Land Registry, and (as stated in their Lordships' judgment), owing possibly to some misconception upon the part of the registrar, she signed a form prepared by him declaring that she was the owner of the whole land referred

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to in the deed of 1893, that the only deed in her possession was the conveyance of June 14, 1905, from her husband to herself, and applying to be put upon the Register of Absolute Fees under the Act in respect of it. She, however, handed the second deed of June 14, 1905, by which she had conveyed the 4·14 acres back to her husband, to the registrar, and it remained in the office but was not registered. In pursuance of this application Mary Jane Sheard's name was entered in the Register of Absolute Fees and a certificate issued to her.

By an agreement dated June 1, 1908, Mary Jane Sheard sold the 4·14 acres to the respondent Miller, who applied to be registered in the Register of Charges under the Act in respect of the land and was so registered, the nature of his interest not being stated. The respondent Miller subsequently sold to the respondent Wilkinson.

Upon proceedings taken by Mary Jane Sheard, at the instance of the respondent Miller, an order was made confirming the agreement, but this order was set aside by the Court of Appeal (see 16 Brit. Col. Rep. 48). Mary Jane Sheard in those proceedings admitted the title of the appellant.

The action was tried by Murphy J., who made a decree for specific performance against both defendants, and this decision was affirmed by the Court of Appeal of the Province (Macdonald C.J., Irving and Martin JJ.A.).

Upon an appeal to the Supreme Court of Canada, that Court was equally divided in opinion, the Chief Justice with Duff and Brodeur JJ. being in favour of dismissing, while Davies, Idington, and Anglin JJ. were in favour of allowing the appeal. The appeal accordingly stood dismissed.

Owen Thompson and *V. Laursen*, for the appellant. It is clear upon principle that no decree for specific performance should have been made against the appellant as she was not a party to the agreement for the sale of the property. The vendor as the registered owner of an absolute fee in the property had under s. 24 of the Land Registry Act, 1906, only a prima facie title. The Act by the definition clause, s. 3, and by ss. 15, 16, and 24, draws a clear distinction between registration of an

"indefeasible fee" and an "absolute fee." Even if the unregistered conveyance of June 14, 1905, was, by reason of s. 75 of the Act, inadmissible to disprove her registered title, that title was rebutted by the evidence of her own admissions. She must be deemed to be a trustee for the appellant, and a decree for specific performance against her would be to compel her to commit a breach of trust. Further, the unregistered conveyance was admissible against her as a case of fraud was open upon the facts, though it was not pressed. The effect under s. 29 of the registration by the first respondent of a charge upon the property did not increase his rights under the sale agreement, but merely gave him under s. 52 priority over subsequent incumbrancers. The effect in law and in equity of the registered charge must depend upon the nature of his interest under the agreement. The view that the unregistered conveyance was inadmissible as against him by reason of s. 75 is erroneous. The appellant did not rely upon that deed as against the respondent's title under the registered charge, namely, the agreement for sale, but as a circumstance to be considered in determining whether in equity that agreement should be enforced by specific performance. Under the circumstances of the case no decree for specific performance should have been made, and the appellant's title against the vendor should be declared. Under s. 92 of the Act the appellant is entitled to rectification of the register in her favour; the respondents must be taken to have waived the filing of an issue and the giving of security under that section.

E. P. Davis, K.C., and *Hon. M. M. Macnaghten*, for the respondents. The action was not one questioning the registered title to the land on the ground of fraud, and did not, therefore, fall within the only exception provided by s. 75 of the Land Registry Act of 1906 to the operation of that section, which rendered the unregistered conveyance inadmissible in evidence. The conveyance itself not being admissible, the evidence of the admissions of the vendor as to the appellant's title under it were inadmissible since they were secondary evidence; in any case they were not evidence against the respondents. If the unregistered conveyance, although excluded from evidence by s. 75, can be considered in order to determine the effect in equity of the

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registered title and charge, the object and utility of the system of registration under the Act will be seriously affected. The aim of ss. 74 and 75 is that persons dealing honestly and complying with the provisions of the Act should be able to rely upon the title disclosed by the register. Under the Act of 1906 there is no material difference between an indefeasible fee and an absolute fee; the Act provides for two classes of titles, namely, (*a*) a title in fee, whether indefeasible or absolute; (*b*) a title described as a charge, which under s. 3 (*f*) includes any equitable interest whatever. The Land Registry Act of 1905 by s. 45 entirely deprived a conveyance of any effect save to give the grantee a right to apply for registration. The Act of 1906, now in question, made the provisions as to registration more elaborate and stringent, and it cannot be supposed that it deprived registered titles of the full protection which they had under the earlier Act. Apart from fraud, of which there was no evidence, the purchaser under his registered title had a right to a transfer of the registered absolute fee, upon paying the purchase price. The vendor became a trustee for him and he got the entire beneficial interest in the estate: *Shaw* v. *Foster* (1); *Lysaght* v. *Edwards*. (2) [*Assets Company* v. *Mere Roihi* (3), *Loke Yew* v. *Port Swettenham Rubber Co.* (4), and *Fells* v. *Knowles* (5) were also referred to.] The decree for specific performance should, no doubt, have been made against the vendor only and not against the appellant.

Owen Thompson in reply. Registration under the Land Registry Acts of British Columbia is evidence of title, and not, as under the Registration Acts in force in some colonies, the foundation of title.

1914 Nov. 6.

The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. In this case the plaintiffs claim specific performance of an agreement dated June 1, 1908, and made between the defendant Mary Jane Sheard of the one part and the plaintiff Miller of the other part, whereby the defendant Mary Jane Sheard contracted to sell, and the plaintiff

(1) (1872) L. R. 5 H. L. 321.
(2) (1876) 2 Ch. D. 499.
(3) [1905] A. C. 176.
(4) [1913] A. C. 491.
(5) (1906) 26 N. Z. L. R. 604.

Miller to purchase, some 4·14 acres of land in the Vancouver District in British Columbia. The plaintiff Nicholson is made a co-plaintiff as sub-purchaser of the property from the plaintiff Miller. The defendant Mildred Howard is joined as co-defendant on the ground that she claims an interest in the property adversely to her co-defendant. In their Lordships' opinion this joinder is misconceived and the judgment given at the trial, and confirmed on appeal, for specific performance against the defendant Mildred Howard and the vesting of her interest in a trustee for the plaintiffs is erroneous and cannot be sustained. There is no equitable principle by virtue of which land can be taken away from the true owner under colour of specific performance of a contract to which he was not a party and which he did not authorize to be made on his behalf. The action should have been dismissed with costs so far as the defendant Mildred Howard was concerned.

So far the case presents little difficulty, but there is a more important question which must be decided before this appeal is finally disposed of. Besides resisting the claim for specific performance as against her, the defendant Mildred Howard set up her own title to the property. She was, she said, entitled to it as heiress-at-law of the late Harry Howard, the former husband of the defendant Mary Jane Sheard, subject, nevertheless, to the dower interest of her mother, the last-named defendant, and she counterclaimed against the plaintiffs and her co-defendant for a declaration to that effect, with certain consequential relief. The defendant Mary Jane Sheard did not defend the counter-claim, which as against her must be taken as admitted. As against the plaintiffs, however, who did defend the counter-claim, the defendant Mildred Howard was put to the proof of her title. In order to prove it she put in three indentures. First, she put in an indenture dated August 23, 1893, whereby a certain block of land, of which the 4·14 acres in question formed part, was conveyed to Harry Howard and his wife, the defendant Mary Jane Sheard, in fee simple, as joint tenants. Secondly, she put in an indenture dated June 14, 1905, whereby Harry Howard conveyed to his wife, the defendant Mary Jane Sheard, an undivided moiety of the whole block in fee simple,

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thus vesting the whole block in her. Thirdly, she put in an indenture, also dated June 14, 1905, whereby the defendant Mary Jane Sheard conveyed to Harry Howard the entirety of the 4·14 acres in question. The two deeds of June 14, 1905, in fact operated as a partition of the block between husband and wife.

The indentures above referred to, if admissible in evidence, are, in their Lordships' opinion, sufficient proof of the title set up by the defendant Mildred Howard, but the plaintiffs contend that the second indenture of June 14, 1905, is not admissible in evidence against them, because of the provisions of s. 75 of the Land Registry Act (chapter 23 of the Statutes of the Province of British Columbia, 1906), being an Act consolidating the existing statutes as to the registration of titles to land.

On reference to this statute it will be found that it contemplates and provides for four registers. First, there is a Register of Indefeasible Fees. A certificate of title to an estate so registered is, as long as it remains uncancelled, conclusive evidence against all the world that the holder is entitled to the estate mentioned in the certificate (ss. 15, 16, and 81).

Secondly, there is a Register of Absolute Fees. The registered owner of an absolute fee is to be deemed to be the prima facie owner of the land referred to in the register for such an estate as he legally possesses therein, subject only to such registered charges as appear existing thereon, and to the rights of the Crown (ss. 15 and 24). The certificate of title is not conclusive but only prima facie evidence of the title of the registered owner. It is to be observed that nothing less than a legal fee simple can be registered as an absolute fee.

Thirdly, there is a Register of Charges (s. 25), that is, according to the definition clause (s. 3), any less estate than an absolute fee, and any equitable interest in land, and any incumbrance Crown debt, judgment, mortgage, or claim to or upon any real estate. The registered owner of a charge is to be deemed to be prima facie entitled to the estate or interest in respect of which he is registered, subject only to such registered charges as appear existing thereon and to the rights of the Crown (s. 29). The certificate of title is not conclusive but only prima facie

evidence of the title of the owner of a registered charge. It is to be observed that an applicant for the registration of a charge has in his application to state the nature of the charge in respect of which he requires registration (Form D in Sched. I. to the Act), and the register has also to state the nature of the registered charge (Form E, same schedule).

Lastly, there is, under s. 116, a register in which are entered copies of all instruments affecting land. Sect. 74 of the Act provides that no instrument executed after and taking effect after June 30, 1905, and no instrument executed before July 1, 1905, and taking effect after June 30, 1905, purporting to transfer, charge, deal with, or affect land or any estate or interest therein (with an immaterial exception) shall pass any estate or interest, either at law or in equity, in such land, until the same shall have been registered in compliance with the provisions of the Act; and s. 75 provides that instruments executed before and taking effect before July 1, 1905, transferring, charging, dealing with, or affecting land or any estate or interest therein, unless registered before the said date (with an immaterial exception), shall not be receivable by the Court or any Court of law or any registrar or examiner of titles as evidence or proof of the title of any person to such land as against the title of any person to the same land registered on or after July 1, 1905, except in an action before the Court questioning the registered title to such land on the ground of fraud wherein the registered owner has participated or colluded. This section, in their Lordships' opinion, imposes a penalty on non-registration of an instrument by rendering the instrument inadmissible in evidence in certain cases, but has no further operation.

Returning to the facts of this case it appears that, after Harry Howard's death, the second deed of June 14, 1905, came into possession of the defendant Mary Jane Sheard, and that on July 30, 1907, she took both the deeds of June 14, 1905, to the Land Registry Office in Vancouver for registration. What happened in the office is obscure, but, owing possibly to some misconception on the part of the registrar, the defendant Mary Jane Sheard ultimately signed an application prepared by him declaring she was owner of the land in question, and claiming to have it

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registered in her name in the Register of Absolute Fees, and obtained such registration; the second deed of June 14, 1905, being absolutely ignored, though the registrar had possession of it and ought to have been aware of its effect. In this, if there was no fraud, there was evidently a serious miscarriage, and the plaintiff Miller in entering into the agreement of June 1, 1908, to purchase the land in question was, undoubtedly, misled by the register and the certificate of title obtained by the defendant Mary Jane Sheard.

The agreement of June 1, 1908, was, in their Lordships' opinion, an instrument purporting to affect land, and, therefore, required registration under s. 74 of the Act. When so registered (but not before) it would confer on the plaintiff Miller an equitable interest his title to which would be registrable in the Register of Charges. On the day after the agreement was signed the plaintiff Miller lodged an application for the registration of his title to a charge by virtue of the agreement, but in this application he did not, as he ought to have done, state the nature of the interest in respect of which he claimed registration. It is material to consider what this interest really was. It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase-money; but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract.

The interest conferred by the agreement in question was an interest commensurate with the relief which equity would give by way of specific performance, and if the plaintiff Miller had in his application attempted to define the nature of his interest, he could only so define it. Further, if the registrar had, as in their Lordships' opinion he ought to have done, specified on the register the nature of the interest which he registered as a charge, he could only have so specified it. Had he attempted further to define the interest, had he, for example, stated it as an equitable fee subject to the payment of the purchase-money, he would have been usurping the function of the

Court, and affecting to decide how far the contract ought to be specifically performed. As a matter of fact the registrar did not, any more than the plaintiff Miller, attempt to define the interest in respect of which registration was granted. He granted registration, having (their Lordships will assume) first entered a copy of the agreement in the register of instruments under s. 116, but the register merely shows that the plaintiff Miller is entitled to a charge under the agreement on the land in question, and leaves the nature of the charge to be inferred. At most, therefore, the plaintiff Miller became the registered owner of an interest commensurate with the interest which, under all the circumstances, equity would decree by way of specific performance of the agreement.

Their Lordships are now in a position to deal with the question whether the second deed of June 14, 1905, was admissible in evidence. First, as regards the defendant Mary Jane Sheard, it was not (having regard to s. 75 of the Act) admissible to disprove the prima facie title conferred on her by her entry on the register as owner of the absolute fee, unless such entry had been obtained by fraud in which she had participated or colluded. But as a matter of fact it was quite unnecessary to adduce the deed as evidence against her at all. She did not defend the counter-claim, thereby admitting the title of the defendant Mildred Howard, as alleged in the counter-claim, and, further, she had on two several occasions admitted this title before the commencement of the litigation, first in her affidavit for the purpose of obtaining letters of administration to Harry Howard's estate, and, secondly, in proceedings which she took (apparently at the instigation of the plaintiff Miller) to have the agreement of June 1, 1908, adopted by the Court on behalf of the defendant Mildred Howard. These admissions, unless satisfactorily explained, would, in their Lordships' opinion, be sufficient to rebut the prima facie title conferred by registration.

Again, as regards the plaintiff Miller, it is quite true that, by reason of s. 75, the second deed of June 14, 1905, is not admissible in disproof of his registered title, but if, as their Lordships have pointed out, he is registered only in respect of an interest commensurate with the relief which equity would decree by way of

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specific performance of the agreement of June 1, 1908, the defendant Mildred Howard is not under the necessity of in any way disputing the title in question. She adduces the deed of June 14, 1905, not as disproving the plaintiffs' title, but as a material circumstance which the Court must take into account in deciding the extent to which specific performance ought to be granted. In their Lordships' opinion, therefore, the objection to the admissibility in evidence of the second deed of June 14, 1905, cannot be sustained, and the defendant Mildred Howard is therefore entitled to the declaration of her title as alleged in her counterclaim.

The defendant Mildred Howard asks also for certain consequential relief by way of rectification of the register and cancellation of existing certificates of title. The Court under s. 92 of the Act has jurisdiction in an action contesting a registered title to make such order as may be just and appropriate under the circumstances. According to this section, before such an action can be brought, the proposed plaintiff should file an issue and give security to the satisfaction of the registrar, and it is possible that the plaintiffs might have obtained a stay of the counterclaim till this had been done. They did not, however, apply for such a stay, nor did they make any objection before their Lordships' Board on the ground that no security had been given and no issue filed. In their Lordships' opinion, therefore, it was open to the Courts below to make, and is open to their Lordships to advise His Majesty to make, such order under s. 92 as may meet the justice of the case.

With regard to the relief to which the plaintiffs are entitled in this action, it would be contrary to all principle to order the defendant Mary Jane Sheard to convey an interest which she has not got and which she cannot convey. The plaintiffs are, however, entitled to repayment of all moneys paid to her under the agreement of June 1, 1908, with interest at 4 per cent. per annum, and their costs of action (except in so far as increased by the joinder of her co-defendant), and a lien for such moneys, interest, and costs on her dower interest in the land in question.

Taking all the circumstances into consideration, their Lordships

are of opinion and will humbly advise His Majesty (1.) that the orders appealed from should be discharged; (2.) that the action should be dismissed with costs throughout as against the defendant Mildred Howard; (3.) that on the counter-claim of the last-named defendant there should be a declaration that notwithstanding the entry on the register she is absolutely entitled to the land in question subject to the dower interest therein of the defendant Mary Jane Sheard, and that the register should be rectified by striking out the entry of the defendant Mary Jane Sheard as owner of the absolute fee in the land in question and entering the defendant Mildred Howard as owner of such absolute fee subject to the dower interest of the defendant Mary Jane Sheard, which dower interest should be entered in the Register of Charges, and that the certificate of title granted to the defendant Mary Jane Sheard should be delivered to the registrar for cancellation, and that the plaintiffs should pay the costs of the counter-claim; (4.) that the defendant Mary Jane Sheard should be ordered to repay to the plaintiffs the moneys already paid by the plaintiff Miller under the agreement, with interest at 4 per cent. per annum, and the costs of the action (except so far as increased by the joinder of the defendant Mildred Howard), and that it should be declared that such moneys, interest, and costs are a lien on the dower interest of the defendant Mary Jane Sheard in the land in question, and that the registrar amend the certificates of title issued to the plaintiffs so as to conform with this report; and (5.) that the plaintiffs should pay the costs of this appeal.

Solicitors for appellant: *Lawrence Jones & Co.*
Solicitors for respondents: *Armitage, Chapple & Macnaghten.*

[PRIVY COUNCIL.]

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JOHN DEERE PLOW COMPANY, LIMITED Appellants;

AND

THEODORE F. WHARTON . . . . . Respondent.

AND CONNECTED APPEAL CONSOLIDATED.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA AND ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA . . . . . } Intervenants.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Canada—Legislative Authority—Company incorporated by Dominion Parliament—Restriction of Corporate Rights in Province—Ultra vires—Companies Act of Canada (*R. S. Can.*, 1906, *c.* 79)—*Companies Act of British Columbia* (*R. S. B. C.*, 1911, *c.* 39), *Part VI.—British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 91 *and* 92.

The authority of the Parliament of Canada to legislate for "the regulation of trade and commerce" conferred by s. 91, enumeration 2, of the British North America Act, 1867, enables that Parliament to prescribe the extent and limits of the powers of companies the objects of which extend to the entire Dominion; the status and powers of a Dominion company as such cannot be destroyed by a provincial Legislature.

Part VI. of the Companies Act of British Columbia (R. S. B. C., 1911, c. 39), which in effect provides that companies incorporated by the Dominion Parliament shall be licensed or registered under that Act as a condition of carrying on business in the Province or maintaining proceedings in its Courts, is therefore ultra vires the provincial Legislature under the British North America Act, 1867.

Consolidated Appeals by special leave from two judgments of the Supreme Court of British Columbia (May 26 and 28, 1913).

The appellants were a company incorporated by letters patent under the authority of the Companies Act of Canada (R. S. Can., 1906, c. 79) and were empowered by their charter to carry on throughout the Dominion the business of dealers in agricultural implements.

* *Present:* Viscount Haldane L.C., Lord Moulton, Lord Sumner, Sir Charles Fitzpatrick, and Sir Joshua Williams.

The first appeal was in an action brought against the appellants by the respondent Wharton, as a shareholder in the company, claiming an injunction to restrain the appellants from carrying on business within the Province without being licensed or registered as provided by the Companies Act of British Columbia (R. S. B. C., 1911, c. 39).

The second appeal was in an action brought by the appellants to recover the price of goods sold and delivered by them to G. W. Duck, the respondent in that appeal, who pleaded that the action was not maintainable since the appellants were not so licensed or registered.

The question for determination in the actions and in the consolidated appeals was whether Part VI. of the Companies Act of British Columbia was ultra vires the legislative authority of the Province under the British North America Act, 1867.

The relevant provisions of the Companies Act of Canada and of the Companies Act of British Columbia are summarized in the judgment of their Lordships.

The effect of Part VI. of the provincial Act is, inter alia, to require that every company incorporated otherwise than under the law of the Province should be licensed or registered under the provincial law, and that until it is so licensed or registered it should not be capable of carrying on business in the Province or of maintaining proceedings in the provincial Courts in respect of any contract made within the Province. The appellants had applied for a licence, but their application was refused by the registrar on the ground that there was another company of the same name upon the register, in which case s. 18 of the above-mentioned provincial Act (as amended by s. 6 of c. 3 of the Acts of British Columbia for 1912) prohibits the grant of a licence.

Both actions were tried by Gregory J., who granted an injunction in the first action and dismissed the second upon the preliminary point of law raised by the pleadings. The learned judge considered himself bound by previous decisions of the Supreme Court of British Columbia, including that in *Waterous Engine Works* v. *Okanagan Lumber Co.* (1)

(1) (1908) 14 B. C. Rep. 238.

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F. W. Wegenast, for the appellants; *Newcombe, K.C.*, and *Raymond Asquith*, for the Attorney-General for Canada. The appellants are a trading company duly incorporated under the authority of the Parliament of Canada and authorized by its charter to trade throughout the entire Dominion. The powers and privileges conferred upon them by s. 29 of the Companies Act of Canada as the effect of that incorporation cannot be controlled or limited by the provincial Legislature. The Parliament of Canada has exclusive powers as to the incorporation of companies with Dominion objects having regard to its legislative authority as to "the regulation of trade and commerce" under s. 91, enumeration 2, of the British North America Act, 1867. Even if the authority of the Parliament of Canada to incorporate the appellant company does not rest upon the specific power under s. 91, enumeration 2, it has authority under its general power over all matters not assigned exclusively to the provincial Legislatures; the authority of a provincial Legislature as to the incorporation of companies under s. 92, enumeration 11, is expressly confined to companies with provincial objects. The effect of the legislation complained of is to control and interfere with the corporate rights and privileges of the appellants and not merely to regulate the manner in which their business is to be carried on in the Province; it cannot therefore be justified under the general powers of the provincial Legislature as to "property and civil rights in the Province" (s. 92, enumeration 13) or any of the other general powers given by that section: *Citizens Insurance Co.* v. *Parsons* (1); *Dobie* v. *Temporalities Board* (2); *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (3); *Bank of Toronto* v. *Lambe* (4); *Attorney-General for Ontario* v. *Attorney-General for the Dominion.* (5) The authority of the Parliament of Canada in the matter is exclusive at any rate since the subject of the incorporation of companies is of sufficiently wide importance: *Brewers and Maltsters Association* v. *Attorney-General for Ontario.* (6) The decisions of the Supreme Court of British

(1) (1881) 7 App. Cas. 96.
(2) (1881) 7 App. Cas. 136.
(3) (1883) 9 App. Cas. 157.
(4) (1887) 12 App. Cas. 575.
(5) [1896] A. C. 348.
(6) [1897] A. C. 231.

Columbia followed by the learned judge below must be considered as overruled by the decision of the Judicial Committee in *Compagnie Hydraulique* v. *Continental Heat and Light Co.* (1); that decision is conclusive in the appellants' favour. The legislation in question is not authorized by s. 92, enumeration 9, since the licence in this case was not imposed for the purpose of raising revenue, and it is not within the genus of the licences there referred to. [The Companies Act of British Columbia (R. S. B. C., 1907, c. 39), ss. 2, 18, 139, 152, 153, 157, 166 to 168, 170, and 173; the Companies Act of Canada (R. S. Can., 1906, c. 79), ss. 5, 10, 12, and 30; the Interpretation Act (R. S. Can., 1906, c. 1), s. 30; *Cunningham* v. *Tomey Homma* (2); and *Union Colliery Co.* v. *Bryden* (3) were also referred to.]

Lafleur, K.C., for the respondents; *Sir R. Finlay, K.C.*, and *Geoffrey Lawrence*, for the Attorney-General for British Columbia. The legislation in the appeals is authorized by s. 92, enumeration 13, of the British North America Act, 1867, that enumeration being "property and civil rights in the Province"; also by s. 92, enumeration 16, which refers to "all matters of a merely local or private nature." While the Parliament of Canada can incorporate a company to carry on business throughout the Dominion, the company's operations in each Province must be subject to regulation by the laws of that Province in all matters falling within those two enumerated objects: *Colonial Building and Investment Association* v. *Attorney-General of Quebec.* (4) The decision in *Union Colliery Co.* v. *Bryden* (3) is distinguishable as the legislation there in question was not genuine coal regulation at all. The Dominion power as to the incorporation of companies does not fall within "the regulation of trade and commerce," but is conferred by the general power contained in s. 91 to make laws for the peace, order, and good government of Canada, and it consequently does not override the powers of the Province under s. 92. The express power given in s. 91, enumeration 15, to incorporate banks shows that incorporation is not included in the powers as to the regulation of trade and commerce. In any case the power under s. 91, enumeration 2, does not extend

(1) [1909] A. C. 194.
(2) [1903] A. C. 151.
(3) [1899] A. C. 580.
(4) 9 App. Cas. 157.

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to the regulation of trade of a purely local character: *Citizens Insurance Co.* v. *Parsons.* (1) The legislation questioned in *Dobie* v. *Temporalities Board* (2) went beyond the local limits of the authority, and the decision in *Union Colliery Co.* v. *Bryden* (3) is distinguishable as the judgment shows that the legislation was not a genuine mining regulation. The decision in *Compagnie Hydraulique* v. *Continental Heat and Light Co.* (4) rests upon the fact that the company was given power to operate works without restriction as to the works being in one province; clauses to this effect appear in the record though not in the report. Sir Arthur Wilson did not intend to lay down the broad unqualified proposition appearing at the end of the judgment; if he did it was overruled by the judgment in *City of Montreal* v. *Montreal Street Railways Co.* (5) The provincial Legislature had power to impose the licences under s. 92, enumerations 2 and 9; *Bank of Toronto* v. *Lambe* (6); *Brewers and Maltsters Case.* (7) [The opinions delivered in the Supreme Court of Canada in *In re Companies* (8) were referred to.]

Wegenast replied.

[VISCOUNT HALDANE L.C. The Attorneys-General as intervenants in private litigation are only entitled to present their views to the Committee and have not a right of reply.]

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Nov. 2.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. These are consolidated appeals from judgments of the Supreme Court of British Columbia. The Attorney-General for the Dominion and the Attorney-General for the Province have intervened.

By the first of the judgments the appellant company was restrained at the suit of the respondent Wharton from carrying on business in the Province until the company should have become licensed under Part VI. of the British Columbia Companies Act. By the second judgment the appellants' action against the respondent Duck for goods sold and delivered was

(1) 7 App. Cas. 96.
(2) 7 App. Cas. 136.
(3) [1899] A. C. 580.
(4) [1909] A. C. 194.
(5) [1912] A. C. 333.
(6) 12 App. Cas. 575.
(7) [1897] A. C. 231.
(8) (1913) 48 Can. S. C. R. 331.

dismissed. The real question in both cases is one of importance. It concerns the distribution between the Dominion and the provincial Legislatures of powers as regards incorporated companies.

The appellants are a company incorporated in 1907 by letters patent issued by the Secretary of State for Canada under the Companies Act of the Dominion. The letters patent purported to authorize it to carry on throughout Canada the business of a dealer in agricultural implements. It has been held by the Court below that certain provisions of the British Columbia Companies Act have been validly enacted by the provincial Legislature. These provisions prohibit companies which have not been incorporated under the law of the Province from taking proceedings in the Courts of the Province in respect of contracts made within the Province in the course of their business, unless licensed under the provincial Companies Act. They also impose penalties on a company and its agents if, not having obtained a licence, it or they carry on the company's business in the Province. The appellant was refused a licence by the registrar. It was said that there was already a company registered in the Province under the same name, and s. 18 of the provincial statute prohibits the grant of a licence in such a case. The question which has to be determined is whether the legislation of the Province which imposed these prohibitions was valid under the British North America Act.

The Companies Act of the Dominion provides by s. 5 that the Secretary of State may, by letters patent, grant a charter to any number of persons not less than five, constituting them and others who have become subscribers to a memorandum of agreement a body corporate and politic for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends, with certain exceptions which do not affect the present case. The Interpretation Act of 1906, by s. 30, provides, among other things, that words making any association or number of persons a corporation shall vest in such corporation power to sue and be sued, to contract by their corporate name, and to acquire and hold personal property for the purposes for which the corporation is created, and shall exempt individual

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members of the corporation from personal liability for its debts, obligations, or acts, if they do not violate the provisions of the Act incorporating them.

Sect. 10 of the Companies Act makes it a condition of the issue of the letters patent that the applicants shall satisfy the Secretary of State that the proposed name of the company is not the name of another known incorporated or unincorporated company, or one likely to be confounded with any such name, and s. 12 gives him large powers of interference as regards the corporate name. Sect. 29 provides that on incorporation the company is to be vested with, among other things, all the powers, privileges, and immunities requisite or incidental to the carrying on of its undertaking, as if it were incorporated by Act of Parliament. Sect. 30 enacts that the company shall have an office in the city or town in which its chief place of business in Canada is situate, which shall be the legal domicil of the company in Canada, and that the company may establish such other offices and agencies elsewhere as it deems expedient. By s. 32 it is provided that the contract of an agent of the company made within his authority is to be binding on the company, and that no person acting as such agent shall be thereby subjected to individual liability.

Turning to the relevant provisions of the British Columbia Companies Act, these may be summarized as follows: An extra-provincial company means any duly incorporated company other than a company incorporated under the laws of the Province or the former Colonies of British Columbia and Vancouver Island (s. 2). Every such extra-provincial company having gain for its object must be licensed or registered under the law of the Province, and no agent is to carry on its business within the Province until this has been done (s. 139). Such licence or registration enables it to sue and to hold land in the Province (s. 141). An extra-provincial company, if duly incorporated by the laws of, among other authorities, the Dominion, and if duly authorized by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the provincial Legislature extends, may obtain from the registrar a licence to carry on business within the Province on

complying with the provisions of the Act and paying the proper fees (s. 152). If such a company carries on business without a licence, it is liable to penalties (s. 167), and the agents who act for it are similarly made liable, and the company cannot sue in the Courts of the Province in respect of contracts made within the Province (s. 168). The registrar may refuse a licence when the name of the company is identical with or resembling that by which a company, society, or firm in existence is carrying on business, or has been incorporated, licensed, or registered, or when the registrar is of opinion that the name is calculated to deceive, or disapproves of it for any other reason (s. 18).

The charter of the appellant company was granted under the seal of the Secretary of State of the Dominion in 1907. It purported, as already stated, to confer power to carry on throughout the Dominion of Canada and elsewhere the business of a dealer in agricultural implements and cognate business, and to acquire real and personal property. It is not in dispute that it was an extra-provincial company having gain for its object. The chief place of business was to be Winnipeg. The registrar refused, as has been mentioned, to grant a licence under the provincial Act to the appellant company. The power of the registrar is not challenged, if the sections of the provincial statute under which he proceeded were validly enacted.

What their Lordships have to decide is whether it was competent to the Province to legislate so as to interfere with the carrying on of the business in the Province of a Dominion company under the circumstances stated.

The distribution of powers under the British North America Act, the interpretation of which is raised by this appeal, has been often discussed before the Judicial Committee and the tribunals of Canada, and certain principles are now well settled. The general power conferred on the Dominion by s. 91 to make laws for the peace, order, and good government of Canada extends in terms only to matters not coming within the classes of subjects assigned by the Act exclusively to the Legislatures of the Provinces. But if the subject-matter falls within any of the heads of s. 92, it becomes necessary to see whether it also falls within any of the enumerated heads of s. 91, for if so, by the concluding words

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of that section it is excluded from the powers conferred by s. 92.

Before proceeding to consider the question whether the provisions already referred to of the British Columbia Companies Act, imposing restrictions on the operations of a Dominion company which has failed to obtain a provincial licence, are valid, it is necessary to realize the relation to each other of ss. 91 and 92 and the character of the expressions used in them. The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October, 1864. To these resolutions and the sections founded on them the remark applies which was made by this Board about the Australian Commonwealth Act in a recent case (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (1)), that if there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms overlapping each other have been placed side by side shows that those who passed the Confederation Act intended to leave the working out and interpretation of these provisions to practice and to judicial decision.

The structure of ss. 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be

(1) [1914] A. C. 254.

avoided. Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co.* v. *Parsons* (1) to the effect that in discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words "civil rights" in particular cases. An abstract logical definition of their scope is not only, having regard to the context of ss. 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality. This may not be difficult to determine in actual and concrete cases. But it may well be impossible to give abstract answers to general questions as to the meaning of the words, or to lay down any interpretation based on their literal scope apart from their context.

Turning to the appeal before them, the first observation which their Lordships desire to make is that the power of the provincial Legislature to make laws in relation to matters coming within the class of subjects forming No. 11 of s. 92, the incorporation of companies with provincial objects, cannot extend to a company such as the appellant company, the objects of which are not provincial. Nor is this defect of power aided by the power given by No. 13, Property and Civil Rights. Unless these two heads are read disjunctively the limitation in No. 11 would be

(1) 7 App. Cas. 96, at p. 109.

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nugatory. The expression "civil rights in the Province" is a very wide one, extending, if interpreted literally, to much of the field of the other heads of s. 92 and also to much of the field of s. 91. But the expression cannot be so interpreted, and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words. If this be so, then the power of legislating with reference to the incorporation of companies with other than provincial objects must belong exclusively to the Dominion Parliament, for the matter is one "not coming within the classes of subjects" "assigned exclusively to the Legislatures of the Provinces," within the meaning of the initial words of s. 91, and may be properly regarded as a matter affecting the Dominion generally and covered by the expression "the peace, order, and good government of Canada."

Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance Co.* v. *Parsons* (1) on head 2 of s. 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade. This head must, like the expression, "Property and Civil Rights in the Province," in s. 92, receive a limited interpretation. But they think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade. Their Lordships are therefore of opinion that the Parliament of Canada had power to enact the sections relied on in this case in the Dominion Companies Act and the Interpretation Act. They do not desire to be understood as suggesting that because the status of a Dominion company enables it to trade in a province and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the

(1) 7 App. Cas. 96, at pp. 112, 113.

exclusive jurisdiction of the provincial Legislatures over civil rights in general. No doubt this jurisdiction would conflict with that of the Province if civil rights were to be read as an expression of unlimited scope. But, as has already been pointed out, the expression must be construed consistently with various powers conferred by ss. 91 and 92, which restrict its literal scope. It is enough for present purposes to say that the Province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the Province restricting the rights of the public in the Province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation. This conclusion appears to their Lordships to be in full harmony with what was laid down by the Board in *Citizens Insurance Co.* v. *Parsons* (1), *Colonial Building and Investment Association* v. *Attorney-General for Quebec* (2), and *Bank of Toronto* v. *Lambe.* (3)

It follows from these premises that those provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial licence of the kind about which the controversy has arisen, or to be registered in the Province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the Province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the Province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carry with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion. Their Lordships are of opinion that this question must be answered in the negative.

In the course of the argument their Lordships gave consideration to the opinions delivered in 1913 by the judges of the Supreme Court of Canada in response to certain abstract questions on the extent of the powers which exist under the

(1) 7 App. Cas. 96. (2) 9 App. Cas. 157.
(3) 12 App. Cas. 575.

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Confederation Act for the incorporation of companies in Canada. Two of these questions bear directly on the topics now under discussion. The sixth question was whether the Legislature of a province has power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province in the absence of a licence from its Government, if fees are required to be paid upon the issue of such licence. The seventh question was whether the provincial Legislature could restrict a company so incorporated for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred, or could limit such exercise within the province. This question further raised the point whether a Dominion trading company was subject to provincial legislation limiting the business which corporations not incorporated under the legislation of the province could carry on, or their powers, or imposing conditions on the engaging in business by such corporations, or restricting a Dominion company otherwise in the exercise of its corporate powers or capacity.

Their Lordships have read with care the opinions delivered by the members of the Supreme Court, and are impressed by the attention and research which the learned judges brought to bear, in the elaborate judgments given, on the difficult task imposed on them. But the task imposed was, in their Lordships' opinion, an impossible one, owing to the abstract character of the questions put. For the reasons already indicated, it is impracticable to attempt with safety definitions marking out logical disjunctions between the various powers conferred by ss. 91 and 92 and between their various sub-heads inter se. Lines of demarcation have to be drawn in construing the application of the sections to actual concrete cases, as to each of which individually the Courts have to determine on which side of a particular line the facts place them. But while in some cases it has proved, and may hereafter prove, possible to go further and to lay down a principle of general application, it results from what has been said about the language of the Confederation Act that this cannot be satisfactorily accomplished in the case of general questions such as those referred to. It is true that even when a company has been incorporated by the

Dominion Government with powers to trade, it is not the less subject to provincial laws of general application enacted under the powers conferred by s. 92. Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the statutes of the Province as to mortmain (*Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1)); or escape the payment of taxes, even though these may assume the form of requiring, as the method of raising a revenue, a licence to trade which affects a Dominion company in common with other companies (*Bank of Toronto* v. *Lambe* (2)). Again, such a company is subject to the powers of the Province relating to property and civil rights under s. 92 for the regulation of contracts generally: *Citizens Insurance Co.* v. *Parsons.* (3)

To attempt to define a priori the full extent to which Dominion companies may be restrained in the exercise of their powers by the operation of this principle is a task which their Lordships do not attempt. The duty which they have to discharge is to determine whether the provisions of the provincial Companies Act already referred to can be relied on as justifying the judgments in the Court below. In the opinion of their Lordships it was not within the power of the provincial Legislature to enact these provisions in their present form. It might have been competent to that Legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the Province to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the Province should, under a statute of general application regulating procedure, give security for costs. But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under s. 92 to the provincial Legislature. The analogy of the decision

(1) 9 App. Cas. 157, at p. 164. (2) 12 App. Cas. 575.
(3) 7 App. Cas. 96

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of this Board in *Union Colliery Co.* v. *Bryden* (1) therefore applies. They are unable to place the limited construction upon the word "incorporation" occurring in that section which was contended for by the respondents and by the learned counsel who argued the case for the Province. They think that the legislation in question really strikes at capacities which are the natural and logical consequences of the incorporation by the Dominion Government of companies with other than provincial objects.

They will therefore humbly advise His Majesty that these appeals should be allowed, and that judgment should be entered for the appellant company in the action of *Wharton* v. *John Deere Plow Company* with costs. The action by the company against the respondent Duck must, unless the parties come to an agreement, be remitted to the Court below to be disposed of in accordance with the result of this appeal. As to the interveners, the Attorney-General of the Dominion and the Attorney-General of the Province, there will be no order as regards costs. The respondents, Wharton and Duck, must pay the costs of the appellant company of this appeal, excepting so far as these have been increased by the interventions.

Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondents: *Linklater, Addison & Brown.*

Solicitors for intervenants: *Charles Russell & Co., and Gard, Rook & Co.*

(1) [1899] A. C 580

[PRIVY COUNCIL.]

UNITED BUILDINGS CORPORATION, LIMITED . . . . . } APPELLANTS;

AND

CORPORATION OF THE CITY OF VANCOUVER . . . . . } RESPONDENTS.

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1914
May 8;
June 15.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

By-law—Stopping Lane—Lease—Powers of Corporation—Construction of Statute—Public Health—Vancouver Incorporation Act, 1900 (*Statute of British Columbia, c.* 54), *s.* 125, *sub-s.* 52—*Municipal Act*, 1906 (*Rev. Stat. of British Columbia, c.* 170), *s.* 194.

The respondents passed a by-law stopping up part of a lane upon the petition of a company which owned land on either side of it, and, upon that company conveying to the respondents land over which the lane could be diverted, they leased the portion so stopped to the petitioning company for twenty-five years at a nominal rent. The respondents had powers under the Vancouver Incorporation Act, 1900, s. 125, sub-s. 52, to pass by-laws for stopping up lanes, that sub-section being one of a group under the head "Public Health"; they also had power to lease the stopped portion for twenty-five years. Under the Municipal Act, 1906, s. 194, a by-law "giving a bonus" requires the assent of the electors of the municipality, which was not obtained by the respondents:—

Held, that, having regard to the other matters included under the head "Public Health" in s. 125 above referred to, the by-law was within the powers of the respondents under sub-s. 52; that the by-law was not outside those powers, nor within the Municipal Act, 1906, s. 194, merely because a benefit specifically accrued to particular persons, and that, no bad faith or improper conduct being shown, it was validly passed.

APPEAL from the Court of Appeal of British Columbia (June 26, 1913) dismissing, owing to an equal division of opinion, an appeal from an order of the Supreme Court of that Province (February 12, 1913).

The respondents in July, 1912, passed a by-law which, after reciting that the Hudson's Bay Company owned certain lots

* *Present:* LORD MOULTON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

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and had petitioned the respondents to stop up a portion of a lane running between some of them, and had in return agreed to convey to the respondents other lots to be used for diverting the lane and also to indemnify the respondents against claims or suits, enacted that the said portion of the lane should be closed and stopped up, and that, upon a conveyance to the respondents of the lots last referred to, they would lease to the company the portion of the lane so closed and stopped up upon the terms and conditions set out in the schedule.

The respondents subsequently executed in favour of the Hudson's Bay Company the agreed lease, which was for twenty-five years at a nominal rent.

The respondents had power to pass by-laws for stopping up lanes under the Vancouver Incorporation Act, 1900, s. 125, sub-s. 52, which, so far as is material, is set out in the judgment of their Lordships; they also had power under sub-s. 215 of that section, as amended by s. 8 of the amending Vancouver Corporation Act, 1907, without the assent of the electors, to lease portions of lanes for a period not exceeding twenty-five years.

On August 7, 1912, the appellants and two ratepayers applied for and obtained an order nisi (under ss. 127—132 of the Vancouver Incorporation Act, 1900), requiring the respondents to show cause why the by-law should not be quashed for illegality upon the grounds that the closing of the lane was not in the public interest, but was solely in the interest of the Hudson's Bay Company, and that it was ultra vires.

The respondents showed cause before Clement J., who by a judgment delivered on February 12, 1913, discharged the order. The nature of the evidence given appears from the judgment of their Lordships. The learned judge was of opinion that the respondents under their Acts had the necessary powers, and he found that the city council had considered the petition of the Hudson's Bay Company honestly and with regard for the public interest. Under these circumstances, he held that the Court could not review the decision of the respondents.

The appellants appealed to the Court of Appeal of British Columbia, which delivered judgment on June 26, 1913

Macdonald C.J. and Galliher J. were of opinion that the appeal should be allowed, while Irving J. and Martin J. held that it should be dismissed; the Court being, therefore, equally divided, the appeal was dismissed.

Sir R. Finlay, K.C., Bodwell, K.C., and *Lazarus*, for the appellants. The respondents had no power under the Vancouver Incorporation Act, 1900, s. 125, sub-s. 52, to pass the by-law. In determining the scope of that sub-section, regard must be had to the fact that it is one of a group of sub-sections under the head Public Health: *Eastern Counties Ry. Co.* v. *Marriage* (1); *Inglis* v. *Robertson* (2); *Fletcher* v. *Birkenhead Corporation.* (3) Stopping up the lane, even if it was an improvement to the city, was not a matter affecting the public health. If, however, the by-law was one which could be passed under sub-s. 52, the authorities show that a power given to a corporation can only be exercised for the purpose of better enabling it to perform its general duties and not for any collateral or outside purpose: *Scott* v. *Glasgow Corporation* (4); *London and North Western Railway* v. *Westminster Corporation.* (5) The last-named decision was reversed by the House of Lords (6) upon the facts, but the principle proceeded upon in the Court of Appeal was not dissented from. In the present case the evidence shows that the by-law was really passed in the interest of the Hudson's Bay Company, and that its enactment was not a bona fide use by the respondent of their statutory powers. Further, the object and effect of the action of the respondents was to give a "bonus" to the Hudson's Bay Company within the meaning of the Municipal Act, 1906, s. 194, and the carrying out of that object by the passing of the by-law was an evasion of the provisions of that section under which the assent of the electors was necessary. The by-law was therefore invalidly passed: *In re Scott and Corporation of Tilsonburg.* (7) In this aspect the present case is indistinguishable from *In re Waterous and Corporation of Brantford.* (8) [*In re Morton and*

(1) (1860) 9 H. L. C. 32.
(2) [1898] A. C. 616, at p. 628.
(3) [1907] 1 K. B. 205, at pp. 213, 214.
(4) [1899] A. C. 470, at p. 492.
(5) [1904] 1 Ch. 759, at p. 772.
(6) [1905] A. C. 426.
(7) (1886) 13 Ont. App. Rep. 233.
(8) (1903) 2 Ont. W. R. 897; (1904) 4 Ont. W. R. 355.

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Corporation of St. Thomas (1), *Pells* v. *Boswell* (2), and *In re Inglis and City of Toronto* (3) were also referred to.]

E. P. Davis, K.C., and *Hon. M. Macnaghten*, for the respondents, were not called upon.

The judgment of their Lordships was delivered by

LORD SUMNER. On July 15, 1912, the Corporation of the city of Vancouver enacted a by-law for the diversion of a lane in that city, which was a public highway. Part of it, which led into one thoroughfare, was stopped up and, by giving it a right-angled turn, the lane was made to lead into another instead. The corporation made provision for an extra space for vehicles to turn in at the corner. Whether that space was in fact sufficient, and whether the change itself hampered the preservation of the adjacent buildings in case of fire, are questions which do not arise before this Board. If the corporation had power to pass the by-law at all, it had authority to determine such questions: *Haggerty* v. *Victoria*. (4)

The alteration in the lane was made at the instance and on the petition of the Hudson's Bay Company, whose building land lay on both sides of the part which was closed. They did not seek to assist the traffic of the locality or to promote the health of the neighbourhood. They wished to obtain a building lease of the closed part of the lane, and so to be able to erect a long unbroken block of buildings instead of two smaller ones. The corporation drove a bargain with the Hudson's Bay Company, and it has not been contended that the bargain did not secure for the city and the public an ample quid pro quo. Two points only in that bargain need be referred to. It was known, firstly, that there was opposition to the proposed by-law, and the corporation took an indemnity from the Hudson's Bay Company "against any actions or suits which may be brought against the city by reason of the passing of the by-law closing said lane and stopping up thereof." Secondly, the corporation, having discharged the closed portion of the lane from the public right of highway,

(1) (1881) 6 Ont. App. Rep. 323.
(2) (1885) 8 Ont. Rep. 680.
(3) (1905) 9 Ont. L. R. 562.
(4) (1895) 4 Brit. Col. Rep. 163, at p. 164.

leased it to the company at one dollar per annum, without taking any covenant to build on it, for twenty-five years, the longest term within the corporation's leasing powers exercisable without the express assent of the ratepayers, signified by popular vote (s. 8 of the Act of 1907 amending the Vancouver Incorporation Act, 1900).

In enacting the by-law the corporation acted under the Vancouver Incorporation Act, 1900, s. 125, sub-s. 52. It has been argued that the transaction was one which amounted to giving a "bonus" to the Hudson's Bay Company within s. 194 of the Municipal Act, 1906, sub-ss. 171 to 184 of the Vancouver Act not applying to this transaction. If so, the by-law enacted required for its validity the assent of not less than "three-fifths in number of the electors" voting upon it, when duly submitted to the "electors of the municipality" before its "final passage." There is nothing in the evidence to prove any motive for avoiding reference to the electorate, and no evidence, nor indeed any suggestion, of corruption against members of the corporation personally.

Strong opposition to the Hudson's Bay Company's petition was offered by the now appellants, who, as owners of property abutting on the unclosed portion of the lane, considered their premises to be injuriously affected. On the other hand, the petition had the support of an actual majority of the owners of property in the lane. The appellants as ratepayers obtained a rule nisi calling on the corporation to show cause why the by-law should not be quashed, on the grounds that the closing of the lane was not in the interest of the public but was solely in the interest of the Hudson's Bay Company, that it worked hardship to the ratepayers, and was ultra vires. Evidence on affidavit was filed, and eventually Clement J. discharged the rule. An appeal was taken to the Court of Appeal of the Province of British Columbia, and the members of that Court being evenly divided in opinion, it stood dismissed, and leave was given to appeal to their Lordships' Board.

The grounds taken before their Lordships have been twofold: First, it was said that there was no power to enact this by-law under s. 125, sub-s. 52, because it was not a matter of public

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health; secondly, it was said that the exercise of the power, if any, was not in good faith, but was actuated by motives, and resorted to for purposes, other than those which the section impliedly requires. The latter ground may be taken first.

The direct evidence is that of three aldermen, members of the Board of Works, who swear that the Board, before whom the matter came, decided unanimously, considering the request a reasonable one and thinking that, in the interests of the city, it ought to be granted, in view of the class of building which the Hudson's Bay Company proposed to erect, and of the facilities offered in return to the other owners in the block in question. Each added his opinion that the change improved the access of light to buildings in the lane and did not injuriously affect any of the owners in the other lots. To the facts thus deposed to there was no contradiction in the evidence filed, though there was evidence that the opposite opinion was entertained by other persons. The statement of these aldermen of course is not conclusive, but it is entitled to very serious consideration. No fact was urged against it except the character of the transaction itself. The personal credit of these deponents was not impugned at all. There can be no doubt on the facts that the site leased will be built on by the lessees in their own obvious interest, though they have not covenanted to do so. It is easy, especially for those who conceive themselves to be sufferers by it, to suspect and to suggest and even to argue with some plausibility that such a transaction cannot have been carried through without some improper or sinister motive on the part of those members of the corporation who voted for it, in this case all who were voting: and, since opinions differed on this question in the Court below, their Lordships freely recognize that it might bear one aspect or the other, but judging it, as they must do, upon a judicial survey of the whole proved materials, with the experience of men of the world and the full persuasion that such a charge must be proved by those who make it, their Lordships are unable to differ from the opinion of those members of the Court below who held that the transaction was free from impropriety or bad faith.

Two grounds were urged for the contention that there was no jurisdiction to enact the by-law. The first was that sub-s. 52 is

to be limited to such acts named therein as are done for purposes of public health. This is inferred from the heading of the fasciculus of sub-sections to which sub-s. 52 belongs, and also from the character of the acts named in the other sub-sections within the fasciculus as well as in the sub-section itself. The second ground is that the public health powers and the bonus powers of the corporation must be deemed to be mutually exclusive, especially as the first may be exercised without any ratification by a popular vote, while the second requires it. Hence it is said that as the transaction fell within the bonus powers the sub-section conferring public health powers cannot be construed so as to cover it.

The material words of s. 125 and sub-s. 52 are as follows:—

Sect. 125. "The council may from time to time pass, alter, and repeal by-laws:— . . . . Public Health. . . . . (52.) For stopping up . . . . lanes . . . . within the jurisdiction of the council."

Other matters dealt with in this sub-section are:—"Making . . . . improving, repairing . . . . altering . . . . sewers, watercourses . . . . streets, squares . . . . taking or using any land in any way necessary or convenient for the said purposes; conducting the drains and sewers beyond the limits of the said city for fertilizing purposes . . . . and for entering upon . . . . any land in any way necessary or convenient for the said purpose, and repairing and maintaining all bridges."

That the titles, which a statute prefixes to parts of the Act, may be looked at as aids to the interpretation of the language of such parts is well settled, but the assistance to be derived from such consideration varies very much. The title here is "Public Health," an expression often used very comprehensively and often including much that is only concerned with public welfare. Examination of the specific matters enumerated in this fasciculus of sub-sections shows that the scope of this part of the Act is general. They range from prescribing "the duties of health officers and scavengers" (35.), and "filling or closing" any water-closets, privies . . . . or cesspools (50.), to the repair of bridges (52.), and the regulation of the weight of bread (55.); from "ordering the removal of laundries from any particular

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locality where, in the opinion of the council, such laundries are . . . . an eyesore to the locality" (40.), to "preventing the encumbering by . . . . vehicles, vessels, or other means of any . . . . river or water or any road . . . . bridge, or other communication" (41.), and to declaring "any . . . . structure . . . . dangerous to the public safety" . . . . and ordering "that the same shall be removed" (48.). It is not impossible that these last-mentioned matters may have some connection, though remote, with the physical and moral health of the community, but they seem to have as little to do with public health in this sense as with eugenics. A similar observation arises on sub-ss. 21 to 33, which are headed "Public Morals" and include the regulation of bowling alleys (29.), and the prohibition of the sale of cigarettes to children (21.), on the one hand, and on the other the prevention of brothel keeping (26.), and indecent exposure of the person, and also on sub-ss. 63 to 77, which under the title of "Markets" extend from light weight and short measure (76.) to forestalling and regrating (68.). The question is one o construction only, and their Lordships agree with Martin J.A., in the Court below, that s. 125 has been drawn generally so as to combine together various powers many of which are of analogous character, but without adhering to strict classification.

There are various minor difficulties in the way of those who seek to quash this by-law, which may be dismissed shortly. So far as the by-law in question stops up part of the lane and diverts the rest it was made honestly within the powers given by s. 125, sub-s. 52. Only by introducing the resolution to lease the disused part to the Hudson's Bay Company is any semblance produced of giving "any bonus," and this has been carried out by the actual grant of a subsisting lease. The procedure for quashing a by-law (ss. 127—132) and the application and rule nisi in the actual case do not extend to setting aside the lease. Their Lordships think that this point of form should not be passed over. Further, there is a separate power of leasing under the principal Vancouver Act of 1900, s. 125, sub-s. 215, and s. 8 of the amending Act of 1907. This power of leasing lanes or portions of lanes, if the lease is for a period not exceeding twenty-five years, may be exercised without

the assent of the electors. It applies to portions of lanes disused because the thoroughfare is stopped, and cannot well apply to them till it is stopped. It is true that the power to lease for twenty-five years is contained in a proviso upon the older sub-section of 1900, but it would be an untenably narrow construction of that sub-section to say that the power of leasing is confined to such property as has been obtained under a by-law made by the corporation; it is enough that it be property at one time required for the use of the corporation, and no longer so required.

The remaining argument is one of great public importance, but the facts do not raise it in the present case in a shape that involves any new decision upon it. Where the competent Legislature has imposed on a municipal corporation such a condition, either precedent or subsequent, to the exercise of its powers as the sanction of a vote of the ratepayers, it is essential that no elastic construction should be placed upon a sub-section which would enable the local authority to evade the restrictions of the statute. (See *In re Barclay and Darlington Township* (1), per Sir J. B. Robinson, and *In re Scott and Corporation of Tilsonburg* (2), per Hagarty, C.J.) But though the operation of a by-law benefits one or more persons more than others, it does not follow that by enacting it a corporation must be taken to "give any bonus" within the Municipal Act, 1906, s. 194, nor can a by-law be said to be outside the powers conferred by s. 125 of the Vancouver Act, 1900, merely because steps taken in the public interest are accompanied by benefit specifically accruing to private persons: *In re Inglis and City of Toronto.* (3) If no one could benefit by this by-law but the Hudson's Bay Company, and the whole advantage to the public at large, or to other members of the public, was to be found in the consideration moving from the Hudson's Bay Company to the corporation, the matter might well be otherwise. Here, however, the by-law was supported by a majority of property owners affected, who are not shown to have had any interest but that which consisted in

(1) (1854) 12 Upper Can. Q. B. 86, at p. 92.

(2) 13 Ont. App. Rep. 233, at p. 237.

(3) 9 Ont. L. R. 562.

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the alteration of the lane itself, and there is uncontradicted evidence of a belief on the part of those or some of those enacting the by-law that the alteration in the lane was a public though a local improvement in facilitating the access of light. This last fact alone is enough to distinguish the cases of *In re Peck and Corporation of Galt* (1), *In re Morton and Corporation of St. Thomas* (2), *Pells* v. *Boswell* (3), and *In re Waterous and Corporation of Brantford* (4), which are in some respects similar. There is no sufficient juridical reason for rejecting this evidence. Their Lordships cannot speculate about the unascertainable motives of unknown persons. They must act on the evidence as it stands. To those familiar with the locus in quo it may seem improbable, or even impossible, that the advantages to be derived from the change in the lane itself were the reason for enacting the by-law, but as the plaintiffs shaped and left their case, it is quite consistent with the possibility that the mere alteration in the lane itself was, partly and even largely, for the general benefit and was an improvement in the interior communications of the city for the benefit of the public health in a wide sense of the term. This being so, and no bad faith or improper conduct being shown, their Lordships are unable to say that the decision of the Court below was wrong, and will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Gard, Rook & Co.*
Solicitors for respondents: *Bischoff, Coxe, Bompas & Bischoff.*

(1) (1881) 46 Upper Can. Q. B. 211.
(2) 6 Ont. App. Rep. 323.
(3) 8 Ont. Rep. 680
(4) 2 Ont. W. R. 897; 4 Ont. W. R. 355.

[PRIVY COUNCIL.]

WINDSOR, ESSEX AND LAKE SHORE RAPID RAILWAY COMPANY . . . . } APPELLANTS;

AND

NELLES AND ANOTHER . . . . . RESPONDENTS.

J. C.*
1914
July 24, 27;
Oct. 20.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Procedure—Right of Appeal to Supreme Court—Action for Specific Performance or Damages—Supreme Court Act (*R. S. Can.*, 1906, c. 139), *s.* 38 (*c*).

An action claiming specific performance of an agreement or damages for its breach is an action "in the nature of a suit or proceeding in equity" within the meaning of the Supreme Court Act (R. S. Can., 1906, c. 139), s. 38 (*c*), and an appeal lies, under that section, to the Supreme Court from a judgment of the Court of Appeal for Ontario decreeing in the action specific performance with a reference to the Master to assess the damages in case of default.

APPEAL by special leave from a judgment of the Supreme Court (December 10, 1912) affirming a judgment of the Court of Appeal for Ontario (September 28, 1911).

The appeal raised various questions of law and fact, but was determined solely upon the question of procedure to which this report relates.

The respondents instituted an action in the High Court of Justice for Ontario claiming, both by the writ and the statement of claim, against the appellants and other defendants specific performance of an agreement dated May 1, 1905, or damages for its breach. Under the agreement in question a large number of shares and bonds in the appellant company were agreed to be transferred to the respondents. The appellants were not parties to the agreement, but were alleged and were held to have adopted and ratified it.

The action was tried by Clute J., who gave judgment against all the defendants, decreeing specific performance and in default ordering a reference to the Master to assess the damages. On

* *Present:* LORD DUNEDIN, LORD PARKER OF WADDINGTON, LORD PARMOOR, and SIR CHARLES FITZPATRICK.

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April 21, 1908, the Court of Appeal for Ontario affirmed this judgment as against the appellants and dismissed the suit as against the other defendants on the ground that they acted only as agents for the appellants.

The appellants failed to deliver the shares or bonds in accordance with the agreement, and there was a reference to the Master, who reported as to damages, his report being afterwards varied on appeal to the Chief Justice of the Common Pleas.

On March 8, 1911, upon a motion on further directions, the Chancellor of Ontario entered judgment in accordance with the report as varied for the two respondents respectively for sums exceeding $10,000 and $17,000.

The appellants appealed to the Court of Appeal for Ontario against the judgment of the Chief Justice of the Common Pleas and the judgment of the Chancellor, and both appeals, which were heard together, were dismissed. The appellants then appealed to the Supreme Court and sought upon that appeal to review the original judgment of the Court of Appeal of April 21, 1908.

The Supreme Court (Davies, Idington, Duff, and Anglin JJ., Brodeur J. dissenting) held that it was not competent for the Court to review that judgment and dismissed the appeal. The majority of the Court held that the Chancellor upon the motion on further directions could not take into consideration any matter which was at issue in the original hearing, that the Court of Appeal could not on the appeal do what the Chancellor might not do, and that the Supreme Court, being limited by s. 51 of the Supreme Court Act to giving the judgment which the Court appealed from should have given, was equally precluded from reviewing the judgment of April 21, 1908.

The Judicial Committee in giving special leave to appeal reserved to the respondents the right to contend that an appeal from the judgment of April 21, 1908, was not competent.

Matthew Wilson, K.C., and *Ewart, K.C.*, for the appellants.

E. S. Wigle, K.C., and *G. S. Gibbons*, for the respondents. The action was "in the nature of a suit or proceeding in equity" within the meaning of the Supreme Court Act, s. 38 (*c*). The

High Court, in which the action was instituted, is a superior Court of Equity within that section: Judicature Act (R. S. Ont., 1897, c. 51), ss. 25 and 26. The appellants, therefore, had a right of appeal to the Supreme Court from the judgment of the Court of Appeal of April 21, 1908, but the time allowed for appealing by s. 69 of the Supreme Court Act has long since elapsed, and that judgment is res judicata against the appellants. The decision in *Clarke* v. *Goodall* (1) is distinguishable, as in that case the statement of claim disclosed only a common law cause of action. [3 & 4 Geo. 5, c. 51, s. 2, enacted by the Parliament of Canada since the hearing in the Supreme Court, and the Chancery Act (R. S. Ont., 1877, c. 40), s. 40, were also referred to.]

Matthew Wilson, K.C., in reply. The action was in substance a common law action for damages and one to which s. 38 did not apply. If the trial judge had himself assessed the damages and entered judgment there would have been a final judgment and a right of appeal under s. 36 of the Supreme Court Act. It is established by Canadian authorities that a judgment which leaves damages to be assessed is not a final judgment within that section: *Clarke* v. *Goodall* (1); *Crown Life Assurance Co.* v. *Skinner*. (2) There was consequently no right of appeal from the judgment of April 21, 1908, when pronounced. The judgment of the Chancellor, however, finally determined the rights of the parties, and upon appeal from that judgment it was open to the Supreme Court to review the original finding of liability. If this is not so the appellants are deprived of any right of appeal to the Supreme Court upon the question of liability, although the amount in controversy far exceeds the appealable amounts referred to in s. 2 of 10 Edw. 7, c. 24 (Ont.), and in the Supreme Court Act, s. 48.

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The judgment of their Lordships was delivered by

LORD DUNEDIN. The plaintiffs and respondents in this case were engineers and contractors, and acted as promoters in making preliminary arrangements and negotiating franchises through the different municipalities for the defendant company, now appellants.

(1) (1911) 44 Can. S. C. R. 284. (2) (1911) 44 Can. S. C. R. 616.

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The defendant company was incorporated by an Act of the Province of Ontario of 1901. The plaintiffs entered into an agreement with certain persons who formed the major part of the provisional directors of the company, by which they stipulated for a payment of $72,000 of the paid-up capital stock of the company and $45,000 of the first mortgage bonds of the company to be paid to them by the company in respect of their services as promoters. The line was eventually constructed under arrangements which need not be here detailed.

The present action was brought on September 25, 1906, by the plaintiffs against the company and against the individuals who had been parties to the above-mentioned agreement. In the writ and statement of claim they claimed specific performance of the terms of agreement or damages for breach thereof with various ancillary claims which need not be detailed. The action was tried before Clute J., and judgment was given against all the defendants on March 16, 1907, decreeing specific performance, and on failure to make good that decree to go before the Master on a reference as to damages.

Appeal was taken by all the defendants to the Court of Appeal for Ontario, when, on April 21, 1908, the judgment of the trial judge upon the merits (the defendants having on various grounds denied liability altogether) was affirmed. The action was, however, dismissed as against the individual defendants, but specific performance was again decreed against the company, and, failing specific performance, a reference as to damages. Upon that judgment the defendants (the present appellants) took no step to bring it to further appeal, but went back to the Court below and appeared before the Master, before whom a long and expensive reference was conducted. On April 7, 1909, the Master made his report. That report was brought before the Chief Justice of the Common Pleas by appeal, and on January 23, 1911, the Chief Justice varied the amount as brought out by the Master. On March 8, 1911, on a motion for further directions, the Chancellor of Ontario gave judgment against the company in accordance with the report as varied.

The company then appealed to the Court of Appeal for Ontario against the judgment of the Chief Justice varying the Master's

report and the judgment of the Chancellor on further directions. On April 28, 1911, the Court of Appeal unanimously dismissed both appeals with costs.

The appellants then appealed to the Supreme Court of Canada against the last judgment and sought in that appeal to review the original judgment of the Court of Appeal of April 21, 1908. The question of jurisdiction or competency was raised, and the registrar of the Supreme Court affirmed the jurisdiction of the Supreme Court to hear an appeal from so much of the judgment of September 28, 1911, as had reference to the order of the Chancellor on further directions, but held that the Supreme Court had no jurisdiction to hear an appeal from the original judgment of April 21, 1908. This order of the registrar was confirmed on appeal by the Supreme Court of Canada on February 23, 1912.

On March 6, 1912, an application was made by the appellants to the Chief Justice of Ontario for special leave to appeal from the original judgment of April 21, 1908, but was refused. On June 18, 1912, a motion by way of appeal from this order was made to the Court of Appeal for Ontario, and a substantive motion was also made to extend time and for leave to appeal. Both motions were refused, and the reasons of refusal were given by Maclaren J. in a judgment in which Moss, Chief Justice of Ontario, and Garrow and Magee JJ. concurred, in the following words:—"The trial Court ordered specific performance and in default damages. On appeal to this Court the judgment was modified, but specific performance was decreed against the company on April 21, 1908. . . . . In my opinion the company might have appealed as of right from the last-named judgment within the sixty days provided by s. 69 of the Supreme Court Act. . . . . Sect. 38 (*c*) of the Supreme Court Act gives an appeal to that Court from any judgment whether final or not of the highest Court of final resort . . . . in any action, suit, cause, matter, or judicial proceeding in the nature of a suit or proceeding in equity. . . . . Assuming that we still have the power under s. 71 of the Supreme Court Act to extend the time and allow the appeal, I am strongly of the opinion that it should not be done."

On the argument of the appeal before the Supreme Court of Canada from the judgment on further directions which, as already

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mentioned, had been allowed by the judgment of that Court of February 23, 1912, the appellants maintained that this was a common law action, and that, if so, they were entitled as of right to open up the original judgment on the appeal from the judgment on further directions. On December 10, 1912, the Supreme Court of Canada dismissed the appeal, holding that they were not entitled under it to touch the original judgment of April 21, 1908.

When the appellants applied to this Board for special leave to appeal, the point was taken by the respondents that no appeal ought, in the circumstances above detailed, to be allowed against the original judgment of April 21, 1908. Their Lordships have perused the remarks of those of their Lordships who sat at the Board on the occasion of granting leave to appeal, and they are clearly of opinion that such leave was only granted periculo petentis, and that the point of whether leave upon a full knowledge of the circumstances should have been granted is still open.

The first matter to be considered is whether the Supreme Court was right in holding that under the judgment on further directions they were not entitled to go into the question of the merits which had been disposed of in the original judgment of April 21, 1908. Assuming that this were a common law action, the difficulty might be said to arise in this way: The appellate jurisdiction of the Supreme Court is dealt with as regards final judgments by s. 36 of the Supreme Court Act. Now in the original common law procedure the judgment on liability and damages would always be given at one and the same time. That is obviously the case in cases tried by a jury, and would also be so in cases tried by a judge, and accordingly a judgment which fixed liability and assessed damages would inevitably be a final judgment. Since, however, the fusion of Courts of law and equity there has grown up a practice—convenient, no doubt, in cases tried before judges without juries—to make a finding of liability and direct an inquiry into damages, a course of procedure which is really borrowed from the equity side. In such a case, is the judgment fixing the liability a final or is it an interlocutory judgment? The view in Canada seems to have prevailed that, so long as the whole matter is not effectively dealt with, the first judgment is merely interlocutory, and that

therefore no appeal as of right lies against the judgment fixing liability, damages being yet undetermined, in a purely common law action. That being so, it seems to their Lordships that the judgment of the Supreme Court was necessarily right. The appeal from the directions had to do with the damages, and the damages alone. All that the Supreme Court could do was to pronounce the order which the judge below should have pronounced if he had done it right. In other words, they might, if they thought right, have varied the amount of the damages; but the judge below never could have touched the judgment on the merits of his own Court of Appeal; he, in pronouncing the order as to the damages, was really merely carrying out what the Court of Appeal had already determined as to the liability; and accordingly the Supreme Court could not pronounce an order which the judge below himself could never have pronounced. This may be inconvenient, and as a matter of fact their Lordships notice that by a subsequent statute (3 & 4 Geo. 5, c. 51, s. 1) an alteration in the law has been made which will allow a judgment of the class of which their Lordships have been speaking, which settles liability and leaves an inquiry as to damages to follow, to be treated as a final judgment. That, however, was not the law in Canada at the period to which these matters relate.

In their Lordships' view, however, this proceeding was not a common law proceeding, but was an equity proceeding. Specific performance was the primary claim, and the alternative claim for damages in default of specific performance is a well-known equity remedy, and in particular was one that was in use to be given by the old Court of Chancery in Ontario, as is evident by s. 40 of the Chancery Act of Ontario (R. S. Ont., 1877, c. 40). That being so, their Lordships are of opinion that Maclaren J. was right in the passage already quoted, and that an appeal as of right against the judgment of April 21, 1908, lay under s. 38 (*c*) of the Supreme Court Act. That appeal was not taken, and although their Lordships are willing to consider that an application under s. 71 was quite competent, that application was made and was refused by the unanimous judgment of the Court of Appeal of Ontario of June 18, 1912. Their

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Lordships have come to the conclusion that if these facts had been fully stated and understood as they now are, no leave to appeal would have been given in this case. In their Lordships' view it would be most unfortunate that where a matter could have been brought up in the ordinary course, and where the discretion of the Court has been exercised, of saying that indulgence as to extended time should not be given, the whole of the proceedings should be allowed to come to an end, a long lapse of time intervene, and then the whole matter be opened from the very beginning by an appeal to this Board.

In these circumstances their Lordships do not express any opinion upon the difficult and intricate questions which were argued before them as to the technical objections which existed against the agreement sued on being binding on the company, but they will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants: *Morley, Shirreff & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA . . . . . } APPELLANT;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } RESPONDENT.

CANADIAN PACIFIC RAILWAY COMPANY . INTERVENANTS.

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July 14, 15;
Oct. 22.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Authority of Province—Provincial Railways—Power to take Lands of Dominion Railway—Crossing Dominion Railway—Ultra vires—Alberta Railway Act (*Stat. of Alberta*, 1907, *c.* 8), *s.* 82, *sub-s.* 3—*Railway Act* (*R. S. Can.*, 1906, *c.* 37), *s.* 8—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 91 *and* 92.

The Alberta Railway Act, s. 82, by sub-ss. 1 and 2, provides that a railway company authorized by that Act may, subject to the approval, order, or direction of the Lieutenant-Governor, take possession of, use, or occupy the lands belonging to any other railway company.

Sect. 7 of c. 15 of the Acts of the Legislature of Alberta for 1912 amends s. 82 above mentioned by adding sub-s. 3, which purports to apply its provisions to the lands of every railway company authorized otherwise than under the legislative authority of the Province, "in so far as the taking of such lands does not unreasonably interfere with the construction and operation" of the railway whose lands are taken:—

Held, (1.) that s. 7 above mentioned is ultra vires a provincial Legislature under the British North America Act, 1867, and that it would not be intra vires if the word "unreasonably" were omitted; (2.) that in a suitable case, having regard to the interests of the public, the Board of Railway Commissioners, acting under s. 8 of the Railway Act, may grant permission for a provincial railway to cross a Dominion railway, the crossing being regulated in accordance with those interests.

APPEAL by special leave from the decision of the Supreme Court of Canada (May 6, 1913) upon a reference under s. 60 of the Supreme Court Act.

The questions referred to the Supreme Court were as to the validity of s. 7 of c. 15 of the Acts of the Legislature of the

* *Present:* VISCOUNT HALDANE L.C., LORD MOULTON, LORD SUMNER, SIR CHARLES FITZPATRICK, and SIR JOSHUA WILLIAMS.

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Province of Alberta, that section being an amendment of s. 82 of the Railway Act (Statutes of Alberta, 1907, c. 8). Both the above sections and the questions referred to the Court are set out in full in the judgment of their Lordships. The effect of the legislation is shortly stated in the head-note.

Before the Supreme Court and in the argument before the Judicial Committee the effect of s. 7 as enabling a provincial railway to cross a Dominion railway was the substantial matter of contention.

The Supreme Court, consisting of Davies, Idington, Duff, Anglin, and Brodeur JJ., delivered its opinion on May 6, 1913 (Brodeur J. dissenting), that s. 7 was ultra vires the Alberta Legislature in its application to railway companies authorized by the Parliament of Canada, and that it would not be intra vires if amended by striking out the word " unreasonably."

The proceedings in the Supreme Court are reported at 48 Can. S. C. R. 9.

Sir R. Finlay, K.C., S. B. Woods, K.C. (Attorney-General for Alberta), and *G. Lawrence,* for the appellant. The legislation in question is intra vires the provincial Legislature under the British North America Act, 1867, s. 92, enumeration 10. The power to authorize a provincial railway to cross other railways, including Dominion railways, is necessarily incidental to the power to authorize the construction of a provincial railway. The authority of provincial Legislatures over " local works and undertakings " under s. 92, enumeration 10, is as complete as that of the Parliament of Canada under s. 91, enumeration 29, over the works and undertakings under heads (*a*), (*b*) and (*c*) of s. 92, enumeration 10. The Parliament of Canada, however, cannot debar a provincial railway from crossing a Dominion railway, subject to due regulation by the Railway Board, since that is not essential to the exercise of effective legislative jurisdiction over Dominion railways; on the other hand, if a provincial Legislature cannot enable a provincial railway to cross a Dominion railway, its power to authorize the construction of provincial railways becomes illusory, since the Province is crossed by many Dominion lines. [*Citizens*

Insurance Co. v. *Parsons* (1), *Hodge* v. *The Queen* (2), *Tennant* v. *Union Bank of Canada* (3), *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (4), and *Grand Trunk Ry. Co.* v. *Attorney-General of Canada* (5) were referred to.] The Railway Board has no power under the Railway Act to debar a provincial railway from crossing a Dominion railway, if the crossing is authorized by the Legislature of the Province; its only power in the matter is to regulate the manner in which the crossing is to be effected. [Railway Act (R. S. Can., 1906, c. 37), ss. 5, 8, 151 (*e*), 176, 225 and 227, Alberta Railway Act (Stat. of Alberta, 1907, c. 8), ss. 69 (*c*) and 82, and *City of Montreal* v. *Montreal Street Railways Co.* (6) were referred to.]

Newcombe, K.C., and *Raymond Asquith*, for the respondent, and *Lafleur, K.C.*, for the intervenants, were not called upon.

The judgment of their Lordships was delivered by

LORD MOULTON. The present appeal relates to two questions which were referred by H.R.H. the Governor in Council for the hearing and consideration of the Supreme Court of Canada pursuant to s. 60 of the Supreme Court Act. These questions relate to the validity of s. 7 of c. 15 of the Acts of the Legislature of the Province of Alberta of 1912, intituled an Act to amend the Railway Act.

Prior to the passing of the above Act, s. 82 of the Alberta Railway Act of 1907 stood in the following form: "The company may take possession of, use or occupy any lands belonging to any other railway company, use and enjoy the whole or any portion of the right of way, tracks, terminals, stations, or station grounds of any other railway company, and have and exercise full right and powers to run and operate its trains over and upon any portion or portions of the railway of any other railway company, subject always to the approval of the Lieutenant-Governor in Council first obtained, or to any order or direction which the Lieutenant-Governor in Council may make in regard to the exercise, enjoyment, or restriction of such powers or privileges.

(1) (1881) 7 App. Cas. 96.
(2) (1883) 9 App. Cas. 117.
(3) [1894] A. C. 31.
(4) [1896] A. C. 348.
(5) [1907] A. C. 65.
(6) [1912] A. C. 333.

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"(2.) Such approval may be given upon application and notice, and after hearing the Lieutenant-Governor in Council may make such order, give such directions, and impose such conditions or duties upon either party as to the said Lieutenant-Governor in Council may appear just or desirable having due regard for the public, and all proper interests, and all provisions of the law, at any time applicable to the taking of land and their valuation, and the compensation therefor and appeals from awards thereon shall apply to such lands, and in cases under this section where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada, it shall do so in addition to otherwise complying with this section."

By s. 7 of the amending Act of 1912 the following sub-section was added to s. 82 above referred to :—

"(3.) The provisions of this section shall extend and apply to the lands of every railway company or persons having authority to construct or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such land does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such other legislative authority."

The questions referred to the Supreme Court of Canada were as follows :—

"(1.) Is section 7 of chapter 15 of the Acts of the Legislature of Alberta of 1912 intituled 'An Act to amend the Railway Act' intra vires of the provincial Legislature in its application to railway companies authorized by the Parliament of Canada to construct or operate railways ?

"(2.) If the said section be ultra vires of the provincial Legislature in its application to such Dominion railway companies, would the section be intra vires if amended by striking out the word 'unreasonably' ? "

At the hearing before the Supreme Court of Canada it would seem that, by consent of counsel representing the Dominion Government and the Province of Alberta respectively, a third question was submitted to the Court for hearing and consideration. It was hypothetical in form and no answer was given to

it by the Supreme Court. Their Lordships do not consider that this question should be regarded as forming part of the questions referred to the Supreme Court by H.R.H. the Governor in Council, or that it is included in the present appeal. No attempt was made to argue it at the hearing, and their Lordships do not propose to take further notice of it.

By s. 92 of the British North America Act, 1867, it is enacted as follows:—"92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:— . . . .

"(10.) Local works and undertakings other than such as are of the following classes:—

"(*a*) Lines of steam or other ships railways canals telegraphs and other works and undertakings connecting the Province with any other or others of the Province or extending beyond the limits of the Province. . . . .

"(*c*) Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

By s. 91 of the British North America Act, 1867, it is enacted as follows:—"91. . . . . It is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:— . . . .

"(29.) Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

It has never been doubted that these words refer to and include railways such as are mentioned in 92 (10.) (*a*) and (*c*) above quoted. Indeed the language seems to point to 92 (10.) so expressly that the contention is frequently heard that it is intended to refer to it solely. It is not necessary to decide that point in the present case. It suffices to say that railways such as are described in 92 (10.) (*a*) and (*c*) come under the exclusive legislative authority of the Parliament of Canada. The

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provincial Legislature therefore has no power to affect by legislation the line or works of such a railway. If authority were required for so plain and evident a conclusion from these statutory provisions, it is to be found in the judgments of their Lordships in the cases of *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1) and *Madden* v. *Nelson and Fort Sheppard Ry. Co.* (2)

The provisions of s. 82 of the Alberta Railway Act, 1907, do not in the opinion of their Lordships necessarily clash with these rights of legislation which thus exclusively belong to the Dominion Parliament, for it is possible to give to the words "railway company" the limited meaning of a company owning and operating a railway situated entirely within the Province, and to that extent the legislation is intra vires. But sub-s. 3, which was added by the Act of 1912 and the validity of which is under consideration, expressly extends s. 82 so as to make it apply to a Dominion railway. With this addition the provisions of s. 82 of the Railway Act, 1907, of the Legislature of Alberta unquestionably constituted legislation as to the physical construction and use of the track and buildings of a Dominion railway, and that of a serious and far-reaching character. Their Lordships have no hesitation therefore in pronouncing that sub-s. 3 is ultra vires of the Alberta Legislature.

They are further of opinion that it would not become intra vires if the word "unreasonably" were struck out of the section. It would still be legislation as to the physical track and works of the Dominion railway, and as such would be beyond the competence of the provincial Legislature. These are matters as to which the exclusive right to legislate has been accorded to the Parliament of the Dominion, so that the provincial Legislatures have no power of legislation as to them, and this holds good whether or not the legislation is such as might be considered by juries or judges to be reasonable.

It was no doubt due to the almost self-evident character of these propositions that at the hearing of the appeal before their Lordships but little attempt was made to support the validity of sub-s. 3 in its entirety. To judge by the reasons given by the

(1) [1899] A. C. 367. (2) [1899] A. C. 626.

learned judges of the Supreme Court in their judgments it would seem that much the same course was adopted in the argument before the Supreme Court. The true aim of the discussion seemed rather to obtain the opinion of the Court and of their Lordships upon hypothetical variations of the section which would have the effect of limiting its application. Indeed, in the hearing before their Lordships, counsel for the appellants practically confined their arguments to the single case of a provincial railway crossing the track of a Dominion railway. Their Lordships are of opinion that great care should be exercised in permitting questions thus referred to the Supreme Court to be varied, more especially when those questions come up on appeal for decision by their Lordships. It may no doubt happen that the questions relate to matters which are in their nature severable, so that the answers given may cast light upon the effect of the deletion or alteration of parts of the provisions the validity of which is being considered. But their Lordships do not desire to give any countenance to the view that counsel may vary the questions by hypothetical limitations not to be found in the provisions themselves or in the questions that relate to them.

In the present instance, however, the case chosen by counsel for the appellants as the subject of their arguments has no doubt strong claims for separate consideration, inasmuch as it is doubtless the case which was mainly present to the mind of the provincial Legislature when considering sub-s. 3. It has reference to the circumstances under which the exclusive power of Parliament to legislate as to Dominion railways appears to operate most harshly on the freedom of action of the Province. It was urged with great force that if the provinces have no power to authorize their railways to cross the tracks of Dominion railways they might theoretically be placed in a position of great difficulty. Regarded in the abstract it might be possible for a tract of country situated in a province to be surrounded by Dominion railways in such a way that unless crossing were permitted a provincial railway situated within that tract would be completely isolated and cut off from access to other portions of the province. But the difficulty is essentially

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administrative, and not one that could be cured by any decision as to constitutional rights. It is scarcely too much to say that it would not be practicable to frame the actual claim of the Province in the present case in such a way that it could be a constitutional right possessed by a province. Even their own counsel admitted that the Province could not give to one of their railways the right to cross a Dominion railway at any place or in any specific way chosen by them. They admitted that the place and manner must be subject to the approval of the Railway Board, a body created by a Dominion statute in the year 1903, whose powers depend on a Dominion Railway Act. How could a constitutional right be measured or defined by the views or decisions of such a body—one which did not exist when the constitution was created?

It is therefore not in abstract constitutional rights but in administrative provisions that the remedy must be sought for the inconveniences which in the abstract might flow from the fact that the exclusive power of legislating as to Dominion railways is vested in Parliament. And in this respect the present form of the Dominion railway legislation indicates and in their Lordships' opinion provides an effective remedy. By s. 8 of the Dominion Railway Act Parliament treats in a special manner the crossing of Dominion railways by provincial railways. These portions of the provincial railways are made subject to the clauses of the Dominion railway legislation, which deal also with the crossings of two Dominion railways, so that the provincial railways are in such matters treated administratively in precisely the same way as Dominion railways themselves. The Parliament of the Dominion is entitled to legislate as to these crossings because they are upon the right of way and track of the Dominion railway as to which the Dominion Parliament has exclusive rights of legislation, and moreover, as the provincial railways are there by permission and not of right, they can fairly be put under terms and regulations. But s. 8 of the Railway Act of the Dominion and the clauses which are by it made binding on any provincial railway crossing a Dominion railway appear to their Lordships to indicate that it is part of the functions of the Railway Board to permit and to regulate such crossings. They are

left unfettered as to whether they will permit such crossings to be at any particular spot or to be carried out in any particular way, and this jurisdiction is essential to them as guardians of those powers of construction and operation of Dominion railways which are necessary for their existence and efficiency. But these powers of permitting crossings by provincial railways under suitable circumstances and with proper precautions have not been given to them idly and for no purpose. They bring with them the duty of using those powers for the benefit of the public whenever an occasion arises where they can be wisely used.

By these provisions the Dominion legislation has in their Lordships' opinion given to provincial railways desiring to cross a Dominion railway all the locus standi that they need for making an application to the Railway Board for permission to do so. The Railway Board is bound to exercise these powers given to it just as much as all other powers given to it so as to advance the best interests of the public. In this way the legitimate claims of provincial railways to obtain facilities for crossing Dominion railways are in fact met as fully as is practicable, and this without risking the chaos of overlapping legislative powers.

Their Lordships are therefore of opinion that both the questions submitted to the Supreme Court of Canada should be answered in the negative and that the decision appealed from was correct. They will accordingly humbly advise His Majesty that this appeal should be dismissed, but without costs.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.* 1914 Nov. 23, 24, 25, 26; Dec. 17.

ELIZA F. T. HIGGS VATCHER AND OTHERS APPELLANTS;

AND

HENRY PAULL AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

Power of Appointment—Defeasance—Condition to be performed by Third Party—Validity—Acts and Documents of Deceased Persons—Presumption of Good Faith.

Under a marriage settlement made in England in 1846 a husband and his then intended second wife had a joint power of appointment over a settled fund among the husband's children, whether by his first or his second marriage, and the issue of such children. In 1857 they went to reside permanently in Jersey, and the husband acquired real estate in that island. By a joint deed executed in 1882 the husband and wife appointed the settled fund in favour of their own family, with a proviso that if the issue of the first marriage should abandon their rights in the appointors' real estate the appointment should be void. The husband died in 1886. Under the law of Jersey no person dying before 1891 had any power to alter the devolution of his real estate in accordance with that law:—

Held, that the appointment was a valid exercise of the power.

Held, further, upon a claim in 1910 to set aside upon the ground of fraudulent misrepresentation a contract made in 1886, that the general presumption which the law makes is in favour of the good faith and validity of transactions which have long stood unchallenged, and if the known facts and existing documents are, though such as to give rise to suspicion, nevertheless capable of a reasonable explanation, the Court ought not to draw inferences against the integrity of persons who have long since been dead and cannot therefore defend themselves.

APPEAL from a judgment of the Superior Number of the Royal Court of the Island of Jersey (May 15, 1912) affirming a judgment of the Inferior Number of that Court (March 23, 1912).

The action was commenced in November, 1910, by the respondents Henry Paull, Maria Florence Paull (his wife), and

* *Present:* LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, LORD SUMNER, and SIR JOSHUA WILLIAMS.

Ellen Vatcher against the appellant Eliza F. T. Higgs, the widow of Henry Vatcher, and Maria George Andrew, the widow of Henry Vatcher, junior, both these defendants being deceased at the date of the appeal. The plaintiffs by their writ claimed to set aside a contract dated August 18, 1886, on the ground that it was fraudulent and voidable (dolosif, frauduleux, et révocatoire). The only substantial question of law arising in the case and upon the appeal was whether a joint appointment made on March 22, 1882, by the first appellant and her deceased husband, Henry Vatcher, in exercise of a power contained in a settlement made upon their marriage and dated April 6, 1846, was (as the plaintiffs alleged) a fraud upon the power.

The circumstances of the case together with the terms of the marriage settlement in question and of the deed of appointment are fully stated in the judgment of their Lordships.

The whole of the evidence was taken either before a jurat in Court or upon commission; it related chiefly to alleged misrepresentations by which the plaintiffs claimed that the contract of 1886 had been induced. These misrepresentations were not particularized in the pleadings, which confined themselves to general charges of fraud in relation to the contract. Upon the question as to the appointment two eminent English barristers were called to give expert evidence upon behalf of the plaintiffs; no similar evidence was adduced by the defendants.

The Inferior Number of the Royal Court delivered judgment on March 23, 1912, in favour of the plaintiffs. It was held that the contract of August 18, 1886, had been induced by fraudulent misrepresentation, and incidentally it was held that the joint appointment of 1882 was a fraud upon the power and invalid.

The Superior Number, by its judgment delivered on May 15, 1912, affirmed this decision.

Younger, K.C., H. E. le V. dit Durrell (Attorney-General for Jersey), *Dighton Pollock*, and *C. T. le Quesne*, for the appellants. The joint appointment was a valid exercise of the power contained in the marriage settlement. It was an unconditional appointment subject to a defeasance upon the performance of a condition by a third party. An appointment of this character

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is valid, though the proviso may be invalid: *Stroud* v. *Norman*. (1) The decision in *Duke of Portland* v. *Topham* (2) is distinguishable, as in that case the appointment itself was subject to a condition. The distinction between the two classes of cases appears from *In re Somes* (3) and *In re Perkins*. (4) In no contingency could a benefit accrue except to an object of the power. Upon the question of misrepresentation there were, it is true, concurrent findings of fact. Those findings, however, were arrived at upon an erroneous view that the appointment was invalid and part of a fraudulent scheme. Further, the trial was unsatisfactory in that the defendants had no proper notice of the misrepresentations intended to be relied on. The law of Jersey is the same as that of England as to the obligation to give particulars of fraud. [Terrien's Commentaries (1554 ed.), bk. 8; Cour Royale, Procédure (Law of January 30, 1833); *Wallingford* v. *Mutual Society* (5); and *Baudains* v. *Richardson* (6) were referred to.] The evidence does not support the findings of fraud. A Court should not put a sinister construction upon the acts and documents of deceased persons when they are capable of an innocent interpretation: per Bowen L.J. in *In re Postlethwaite*. (7) [*Bank of Africa* v. *Cohen* (8) was also referred to.]

Jenkins, K.C., *Grimwood Mears*, and *M. Alavoine*, for the respondents. The appointment was a fraud upon the power. Where an appointment is made subject to a condition or a defeasance, it is necessary to see whether the condition or defeasance is under the circumstances of the case such as to make the appointment an abuse of the power. In the present case the appointees utilized the power in order to dispose of the real estate over which they had by Jersey law no power of disposition. This was an indirect and improper motive and rendered the appointment invalid: *Duke of Portland* v. *Topham*. (2) It is not correct to say that if the proviso were complied with the only persons who could benefit were the other children, who were also

(1) (1853) Kay, 313.
(2) (1864) 11 H. L. C. 32.
(3) [1896] 1 Ch. 250.
(4) [1893] 1 Ch. 283.
(5) (1880) 5 App. Cas. 685, at p. 697.
(6) [1906] A. C. 169, at p. 178.
(7) (1888) 60 L. T. (N.S.) 514, at p. 520.
(8) [1909] 2 Ch. 129.

objects of the power. There was a possible benefit to the first appellant, who was in possession of "Rosemount," and unless the rights of the principal heir were released her possession would be insecure. The decision in *Stroud* v. *Norman* (1) is not applicable to the facts of the present case, since there was here a possible benefit to a person other than the objects of the power. [Farwell on Powers, 2nd ed., pp. 409 and 412, was referred to.] The evidence as to misrepresentation justified the concurrent findings of the two Courts below. In any event, however, if the appointment was bad, the respondents had no consideration for abandoning their rights, and they are entitled to rescission of the contract.

Younger, *K.C.*, in reply.

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The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. Two points arise for decision in the present case. The first is whether the appointment of March 22, 1882, is a valid appointment, a question which is for the most part a question of law. The second is whether the contract of August 18, 1886, was induced by fraud and ought therefore to be set aside, a question which is for the most part a question of fact.

The late Henry Vatcher, senior, who was born in England, was twice married, first to Margaret Way, who died in 1843, and secondly to Eliza Frances Tonkin Higgs. There was issue of the first marriage two children, namely, Margaret, who married a Mr. Torkington, and Henry, who married Maria George Andrew, spinster, and died in 1868, leaving issue the respondents Maria Florence Paull and Ellen Vatcher. There was issue of the second marriage of Henry Vatcher, senior, six children, namely, the appellant John Sidney Adolphus Vatcher, the appellant Edith Mary Atkinson, Bessie Gertrude, who died in 1885 without issue, the respondent Charles Gardner Vatcher, the appellant James Raynold Morley Vatcher, and the appellant Rose Ethel Monckton.

By an indenture of settlement dated April 6, 1846 (being a settlement made in contemplation of the second marriage of Henry

(1) Kay, 313.

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Vatcher, senior), certain funds of the value of 8000*l.* or thereabouts were settled upon trusts for the payment of the income thereof during the joint lives of Henry Vatcher, senior, and his second wife in manner therein provided, and after the death of Henry Vatcher, senior, in case his second wife should survive him, to the second wife during her life or until remarriage, and, subject as aforesaid, in trust for the children of Henry Vatcher, senior, whether by his first or second marriage, or the issue of such children born in the lifetime of Henry Vatcher, senior, and the second wife or of the survivor of them in such shares, upon such conditions, and in such manner as Henry Vatcher, senior, and his second wife should by writing appoint, and in default of such appointment as the survivor of them should by writing or by will appoint, and in default of any such appointment in trust for the children of the said Henry Vatcher, senior, by either marriage who being males should attain twenty-one years or being females should attain that age or marry and the issue of any male child who should die under twenty-one years of age leaving issue who should be living at the period of distribution, to be divided between them if more than one in equal shares, the issue of any deceased male taking per stirpes and not per capita.

By virtue of certain further indentures dated respectively October 19, 1847, and May 19, 1855, certain further funds were settled upon trusts similar in all respects to those declared by the settlement of April 6, 1846, except that there was no power of appointment conferred on the survivor of Henry Vatcher, senior, and his second wife. The aggregate value of the settled property at the death of Henry Vatcher, senior, was about 27,000*l.*

In the year 1857 Henry Vatcher, senior, with his wife and family took up their abode in the island of Jersey.

In the year 1863 he and his second wife purchased jointly with benefit of survivorship a residential property in the island known as "Rosemount," and made their home there. Between the year 1865 and the time of his death Henry Vatcher, senior, made several further purchases of real property in the island. Some of the properties purchased were conveyed to Henry Vatcher, senior, some to Henry Vatcher, senior, and the

appellant John Sidney Adolphus Vatcher jointly with benefit of survivorship, and some to Henry Vatcher, senior, and the appellant John Sidney Adolphus Vatcher jointly for themselves and their heirs. In every case the greater part of the purchase price was satisfied by the creation of "rentes" or incumbrances on the property then or previously purchased.

By a deed of appointment dated March 22, 1882, Henry Vatcher, senior, and his second wife appointed that the funds settled by the said indentures of April 6, 1846, October 19, 1847, and May 19, 1855, should be held by the respective trustees thereof after the decease of the survivor of them the said Henry Vatcher, senior, and his second wife, upon trusts which were declared as follows, that is to say:—"To pay and divide the same unto between and among the child, children or other issue of the said Henry Vatcher by his said wife, Eliza Frances Tonkin Vatcher, when and if they shall attain the age of twenty-one years, but so that such children shall take per stirpes and not per capita, it being our intention to exclude Margaret Torkington, a daughter of me, the said Henry Vatcher, and the children of Henry Vatcher, a son of me, the said Henry Vatcher, from all participation in any appointment hereby made. Provided, and we lastly declare, that this our appointment is to be revocable by us at any time, and that in case the said Margaret Torkington and the two children of the said Henry Vatcher, the son, shall upon the death of me, the said Henry Vatcher, and of me, the said Eliza Frances Tonkin Vatcher, absolutely renounce, decline and abandon as tenants by their procureur or otherwise all rights and claim to which they or either of them may be entitled to or upon the real estate or freehold and leasehold property or lands and rents to which either of us at our death may be entitled under the law of Jersey, or otherwise, the appointment hereby made shall be at an end and absolutely void."

It was suggested in the evidence of English law before the Jersey Courts that this appointment was void as infringing the English rule against perpetuities. The suggestion, however, was not pressed before their Lordships' Board; indeed it is in their Lordships' opinion reasonably clear as a matter of construction that the issue to take under the appointment are issue living at

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the death of the survivor of Henry Vatcher, senior, and his second wife, and all such issue must necessarily attain the age of twenty-one years within the period allowed by the rule. The only objection to the appointment urged before their Lordships was that it constituted a fraud on the power.

The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and appointee, whereby the appointor, or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power. In such a case the appointment is invalid, unless the Court can clearly distinguish between the quantum of the benefit bona fide intended to be conferred on the appointee and the quantum of the benefit intended to be derived by the appointor or to be conferred on a stranger: see *Sadler* v. *Pratt* (1) and *In re Perkins*. (2)

In the present case, by the very terms of the settlement creating the power, the donee is entitled to appoint to one or more of the objects of the power exclusively of the others or other of them. He is also entitled to appoint upon condition. The mere fact, therefore, that he intended to benefit the issue of the second to the exclusion of the issue of the first marriage cannot be alleged against the validity of the execution of the power, nor is it any objection to the validity of such execution that the appointment is subject to a condition subsequent with a defeasance in case the condition be not performed. If, therefore, the appointment is open to any objection it must be by reason of the nature of the condition imposed.

It should be noticed that in the present case the condition is

(1) (1833) 5 Sim. 632. (2) [1893] 1 Ch. 283.

not one to be performed by the appointees; it is to be performed if at all by third parties over whose actions the appointees have no control. The case therefore is clearly distinguishable from *In re Perkins* (1) and also from *Stroud* v. *Norman*. (2) It is also unlike these cases in another respect, namely, that the defeasance in case the condition is not fulfilled is not inserted with a view to an alternative appointment, but with the intention that on failure of the condition the funds are to go upon the trusts limited by the settlement in default of appointment. In their Lordships' opinion both grounds of distinction are of importance. Apart from cases of appointments made in pursuance of a bargain under which the appointor or a person not an object of the power is to derive a benefit there is no authority for holding an appointment bad because it is made on a condition to be performed not by the appointee but by a third party. The real vice of an appointment on condition that the appointee shall benefit the appointor or a third party is that the power is used not with the single purpose of benefiting its proper objects but in order to induce the appointee to confer a benefit on a stranger, and obviously this vice is absent where the condition is not to be performed by the appointee. Nor is there any case in which a bargain to allow the funds to go in default of appointment, or a condition the non-performance of which will leave the funds to go in default of appointment, has been successfully impeached. The limitations in default of appointment may be looked upon as embodying the primary intention of the donor of the power. To defeat this intention the power must be bona fide exercised for the purpose for which it was given. A bargain or condition which leads to the fund going in default of appointment can never therefore defeat the donor's primary intention. Even in the case of a condition to be performed by the appointee the condition does not necessarily invalidate the appointment. As explained by Sir William Page Wood in *Stroud* v. *Norman* (2), it can only do so if the purpose of the appointor in imposing it is to benefit himself or a third person not an object of the power. It is not enough that the appointor or some person not an object of the power may conceivably derive some benefit. If

(1) [1893] 1 Ch. 283. (2) Kay, 313.

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this were not so no father could appoint in favour of an infant child, because if the infant died under twenty-one the father himself would take as next of kin. In order to avoid such appointment it must be proved affirmatively, or the inference to be drawn from the circumstances must be, that the purpose of the appointment is not to benefit the infant but to benefit the appointor through the infant. This is the real answer to the powerful argument put forward by Mr. Jenkins. Though, he said, the renunciation by the first family would enure for the benefit of the second family under the state of circumstances in which the appointment was made, it was none the less possible that the second family might all of them predecease the appointor, in which case it could enure only to the benefit of strangers. Nobody can doubt, however, that the real purpose of the condition was to ensure that the second family, all of them objects of the power, should either (1.) take the whole of the settled funds or (2.), if the first family renounced the real estate in their favour, their share in such funds as in default of appointment. The mere fact that in some conceivable event the renunciation might benefit a stranger could not in their Lordships' opinion invalidate the appointment even if the persons to perform the condition had been appointees.

In the Courts below the question of the validity of the appointment was a question of fact to be determined on evidence. On the evidence before them those Courts could come to no other conclusion than that the appointment was void as constituting a fraud on the power. Their Lordships, however, have to determine the question as a question of law independent of the evidence which was before the Courts below, and in their opinion the appointment was in all respects a good and valid appointment within the scope and intention of the power and cannot be impeached as constituting a fraud thereon.

Their Lordships will now proceed to consider the second question which arises for decision, namely, whether the contract of August 18, 1886, whereby Mrs. Torkington and the two children of Henry Vatcher, junior, renounced their inheritance in the Jersey property in order that the marriage settlement

funds might go in default of appointment, was induced by fraud and ought therefore to be set aside.

Henry Vatcher, senior, died on March 26, 1886, having by his will, dated November 4, 1885, bequeathed to his wife the one-third of his personal estate of which by the law of Jersey he was entitled to dispose in addition to the one-third to which she was entitled by Jersey law; the remaining one-third devolved by Jersey law on his children or their issue. He appointed his wife and his son-in-law, Mr. Atkinson, to be his executors. He also signed prior to his death a document entitled "Expression of my wishes for the guidance of my family in the division of my property." By that document he expressed the wish that in the partage of his real property in Jersey of which by Jersey law he had no power to dispose, Margaret Torkington and the children of Henry Vatcher, junior, should renounce all claim thereto, stating as his reason that the property was uncertain and heavily incumbered and would be an everlasting and unprofitable incumbrance.

On the death of Mr. Vatcher, senior, Maria Florence Vatcher, the eldest daughter of Henry Vatcher, junior, became his principal heiress and as such entitled to take possession of his real estate in Jersey subject to the liability of dividing the same with her coheirs, and of providing for the dower of the testator's widow and of her own mother. In this division her own share would by Jersey law be considerably greater than the share of any of the coheirs including her sister Ellen. Their Lordships will assume that the inheritance consisted of all the items set out in the record, although it appears that as to the properties comprised in schedule B they would not form part of the inheritance until the benefit of survivorship reserved to the widow of Henry Vatcher, senior, had been set aside in appropriate legal proceedings, and although as to the properties comprised in schedules C and D they did not really form part of the inheritance at all, the only right of the coheirs being to have the price paid for them by Henry Vatcher, senior, brought into hotchpot in the division.

Shortly after the death of Henry Vatcher, senior, negotiations took place between his widow and second family on the one hand

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and Mrs. Torkington and the two children of Henry Vatcher, junior, on the other hand as to whether the latter should or should not renounce their shares in the inheritance, it being assumed by all parties, and in their Lordships' judgment rightly assumed, that if they did not do so the appointment of March 22, 1882, would stand, and they would therefore lose all interest in the settled funds. In these negotiations the widow of Henry Vatcher, senior, and his second family were represented by Mr. Coutanche, a Jersey lawyer of repute, and in part also by Mr. Atkinson, who had married a daughter of Henry Vatcher, senior, by his second wife, and was a clergyman. Mrs. Torkington was represented by Mr. Baudains, another Jersey lawyer, and Mrs. Henry Vatcher, junior, and her two daughters, were represented by Mr. Graham, a solicitor practising at Fowey in Cornwall, assisted at times by Mr. Baudains. It is alleged that in the course of these negotiations Mr. Coutanche and Mr. Atkinson fraudulently represented to Mr. Graham that the properties mentioned in the statement to which their Lordships have already referred were, having regard to the incumbrances thereon, of no value at all, and by means of such representation induced Mr. Graham to advise his clients to renounce their inheritance.

These proceedings were instituted on November 12, 1910, that is to say, twenty-four years afrer the alleged fraud. Mr. Coutanche, Mr. Atkinson, and Mr. Baudains are all dead. The attitude which the Court ought to adopt in considering charges of fraud made under such circumstances is well stated by Bowen L.J. in the case of *In re Postlethwaite*. (1) The general presumption which the law makes is in favour of the good faith and validity of transactions which have long stood unchallenged, and if the known facts and existing documents are, though such as to give rise to suspicion, nevertheless capable of a reasonable explanation, the Court ought not to draw inferences against the integrity of persons who have long been dead and cannot therefore defend themselves.

Approaching the question in this way, and after a careful consideration of the evidence, their Lordships have come to the

(1) 60 L T. (N.S.) 514.

conclusion that no fraud has been established on the part of any one. In order to establish fraud it must be proved (1.) that a representation was made; (2.) that this representation was untrue; (3.) that it was untrue to the knowledge of the person making it; and (4.) that it induced the contract. Under no one of these four heads is the evidence really satisfactory. [Their Lordships then considered the evidence in detail, and continued as follows:]

On the question of fraud, therefore, their Lordships cannot take the view adopted by the Courts below. It is true that as a general rule their Lordships' Board treat questions of fact on which there have been concurrent findings in the Courts below as conclusively established, but the present case is a peculiar one. In the first place their Lordships cannot help thinking that the evidence to the effect that the appointment of March 22, 1882, was a fraud on the power to some extent coloured the view taken by the Courts below of other facts. The appointment seems to have been considered as in the nature of an overt act in a fraudulent conspiracy to deprive the first family of their inheritance, which could not lawfully be done according to Jersey law, and other acts of Henry Vatcher, senior, however innocent, are similarly treated. For example, the fact that, so far from paying off the incumbrances on the property, he actually created new incumbrances, and the fact that he took no means to divest himself of what he stated was an onerous property, are in the judgment cited against him. Again, there is in the present proceedings less reason than is usually the case for refusing to go behind concurrent findings. There was no oral evidence at the trial. All the evidence was taken on deposition, and the Courts below were in no better position to judge of its effect than is their Lordships' Board. And lastly, the respondents' counsel did not himself rely on the rule, but expressly invited their Lordships to go into the evidence and come to their own conclusions. This their Lordships have done, and though they regret to differ from the Courts below, they cannot avoid some satisfaction in acquitting of all charges of fraud persons who have long been dead and against whom in their lifetime no such charge was ever made. Their Lordships cannot help thinking on

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reference to the initial stages of these proceedings that no charge of fraud was originally intended to be made. It appears to have been developed in the course of the examination and cross-examination of witnesses for the purpose of the trial. And though in the present case there is no reason to suppose that the appellants were in any way taken by surprise or deprived of the opportunity of proving relevant facts, their Lordships are of opinion that where charges of fraud are intended to be made, full particulars thereof ought to be given in the pleadings, either as originally framed or as amended for that purpose.

The Courts below in setting aside the contract of August 18, 1886, appear to have been influenced to some extent by the fact that the respondent Maria Florence Paull, though of full age by Jersey law, was according to English law still an infant, and that the respondent Ellen Vatcher acted through Mr. Atkinson as her guardian, although his wife had an adverse interest. These points were not relied upon and were in effect abandoned before their Lordships' Board. They are mentioned only to show that their Lordships express no opinion thereon.

Under the circumstances their Lordships will humbly advise His Majesty to allow the appeal and to dismiss the action. With regard to costs their Lordships observe that the appellants produced no evidence of English law in the Court of first instance, and under these circumstances they think that justice will be done if the respondents are ordered to pay the costs of this appeal and four-fifths only of the costs incurred in the Courts below, and will humbly advise His Majesty to that effect.

Solicitors for appellants: *Cameron, Kemm & Co.*
Solicitors for respondents: *Powell & Skues.*

[HOUSE OF LORDS.]

OWNERS OF STEAMSHIP OLYMPIC . . APPELLANTS; H. L. (E.) 1914 Nov. 9.

AND

BLUNT . . . . . RESPONDENT.

OWNERS OF STEAMSHIP OLYMPIC . . APPELLANTS;

AND

COMMISSIONERS FOR EXECUTING THE OFFICE OF LORD HIGH ADMIRAL OF THE UNITED KINGDOM . . . . . RESPONDENTS.

(THE OLYMPIC.)

CONSOLIDATED APPEALS.

Admiralty—Ship—Collision—Overtaking Vessel—Crossing Vessels—Suction or Interaction—Regulations for Preventing Collisions at Sea, arts. 19, 21, 24.

IN this case the owners of the steamship *Olympic* appealed to the House of Lords against a decision of the Court of Appeal which affirmed the decision of the President of the Probate, Divorce, and Admiralty Division. (1)

The House (Viscount Haldane L.C., Lord Atkinson, Lord Shaw of Dunfermline, and Lord Sumner) on November 9,. 1914, affirmed the decision of the Court of Appeal on the evidence and dismissed the appeal with costs.

Counsel: *Sir Robert Finlay, K.C., Laing, K.C., D. Stephens,* and *Dumas,* for the appellants; *Sir John Simon, A.-G., Butler Aspinall, K.C., Bateson, K.C.,* and *C. Robertson Dunlop,* for the respondents.

Solicitors for appellants: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitor for respondents: *Treasury Solicitor.*

(1) [1913] P. 214.

[HOUSE OF LORDS.]

H. L. (E.)* 1914 Dec. 11.

STICKNEY . . . . . Appellant;

AND

KEEBLE AND ANOTHER . . . . . Respondents.

Vendor and Purchaser—Time for Completion—Unnecessary Delay—Notice making Time of the Essence—Reasonableness—Return of Deposit—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 7.

Where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end, and in determining the reasonableness of the time so limited the Court will consider not merely what remains to be done at the date of the notice, but all the circumstances of the case, including the previous delay of the vendor and the attitude of the purchaser in relation thereto.

Per Lord Parker of Waddington: Before the Judicature Acts, equity, where it could do so without injustice to the contracting parties, decreed specific performance notwithstanding failure to observe the time fixed for completion, and as an incident thereof relieved the party in default by restraining proceedings at law based on such failure; but a vendor who had put it out of his power to complete the contract had no equity to restrain proceedings at law based on the non-observance of the stipulation as to time, and *semble* the position of such vendor is not affected by s. 25, sub-s. 7, of the Judicature Act, 1873. *Semble* therefore where an action is brought by a purchaser for the return of his deposit against a vendor who has failed to observe the time fixed for completion, if at any time before judgment the vendor puts it out of his power to complete by selling the property to a third person, he cannot resist the claim.

In June, 1911, the plaintiff, a farmer, agreed to purchase from the defendants agricultural land for occupation as a farm and paid a deposit on the purchase-money. The date fixed for completion was October 11. At the date of the contract the defendants had no legal title to the land, it being part of a larger estate which the defendants had agreed to purchase as a speculation and which they resold in lots to twenty-three purchasers. The defendants delayed completion of the plaintiff's contract in order to complete their title and to procure the simultaneous execution of the conveyances to the sub-purchasers. On January 30, 1912, the plaintiff, who had repeatedly pressed for

* *Present:* Earl Loreburn, Lord Atkinson, Lord Mersey, Lord Parker of Waddington, and Lord Parmoor.

completion, gave notice to the defendants, requiring them to complete in a fortnight, and, on their failure to complete within the time, brought an action for the return of his deposit. At the date of the notice the plaintiff's conveyance awaited the approval of certain mortgagees on the estate and required execution by eight parties residing in various parts of England :—

Held, that there had been unnecessary delay in completion for which the defendants were responsible, and that in the circumstances the time limited by the notice was sufficient.

Decision of the Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal reversing a decision of Joyce J. in an action for the return of a deposit of 2020*l.* paid under a contract for the sale of land.

By an agreement in writing dated June 8, 1911, the appellant agreed to purchase from the respondents certain agricultural lands forming part of the Wawne estate near Hull and containing 612 acres for the sum of 20,200*l.*, and on the execution of the agreement he paid 2020*l.* by way of deposit to the respondents' solicitor, Mr. G. G. G. Wheeler. The particulars of sale stated that the property was subject to certain tenancies and that vacant possession would be given on April 6, 1912. The date fixed for the completion of the contract was October 11, 1911. The conditions of sale provided (condition 15) that if the purchaser should fail to comply with any of the conditions his deposit money should be absolutely forfeited and the vendors should be at liberty (without being obliged to tender a conveyance) to resell, and that the deficiency (if any) arising on such resale and all expenses attending the same should be made good by the purchaser. The appellant was a farmer and, as the respondents knew, was purchasing this land with the intention of working it and occupying it as a farm, being under notice to quit in April, 1912, another farm which he then held. By arrangement with the tenants the appellant in October and November, 1911, ploughed up some 150 acres of the land for the purpose of getting the same ready for immediate use on taking possession.

At the date of the contract of June 8, 1911, the respondents, as appeared from the abstract of title subsequently furnished to the appellant, were not the legal owners of the land, but on April 25, 1911, the respondents had contracted to purchase from

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Major Windham, who was selling, as tenant for life under the powers of the Settled Land Acts, the whole of the Wawne estate, containing upwards of 3000 acres, for the sum of 84,000*l.* The respondents purchased this estate as a speculation with a view to reselling it at a profit and thereby securing the purchase-money which they were unable to pay out of their own moneys, and in the month of June, 1911, they sold the greater part of the estate to twenty-three different purchasers.

Part of this estate, including the land agreed to be sold to the appellant, was subject to a mortgage for 23,000*l.*, and another part of the estate was subject to a mortgage for 12,000*l.*, which was vested in the Hull Trinity House. In the summer of 1911 the appellant, for the purpose of paying his purchase-money, applied to the Trinity House for an advance of 14,000*l.* upon the security of the property comprised in his contract, and it was arranged that the 12,000*l.* which, upon the completion of the sale of the property subject to the Trinity House mortgage, would be paid to the Trinity House should form part of this advance and that the balance should be provided out of other moneys belonging to the Trinity House.

On August 30, 1911, the respondents sent to the appellant's solicitors an abstract of title. A correspondence then ensued between the appellant's and respondents' solicitors in the course of which the appellant's solicitors asked for a supplemental abstract and for an early date for completion, and the respondents' solicitors stated that as the trustees for the purposes of the Settled Land Acts had not been appointed by their clients' vendor there must be further delay, but that they would do their best to get him to push on so that completion was not delayed longer than possible.

On November 14, 1911, the appellant's solicitors wrote to the respondents' solicitors as follows:—

"We regret that we have not heard from you enclosing supplemental abstract of title and date for completion. Unless we receive supplemental abstract within seven days from the date hereof and a date for completion not later than three weeks from to-day our instructions are to cancel the contract and apply for a return of the deposit together with interest damages and costs."

On November 15 the respondents' solicitors replied that they had not received a complete abstract of the appointment of new trustees and that until it was completed and certain outstanding questions of title had been cleared up they could not complete with their vendor.

It had been arranged that the conveyances should be made by Major Windham and the mortgagees to the appellant and the other sub-purchasers direct, and on December 1 Messrs. E. S. Wilson & Sons, Major Windham's country solicitors, sent to the appellant's solicitors a draft form of conveyance together with a letter stating that the form was one which would be employed for the other sub-purchasers and adding: "We have numbered the drafts in the order that we propose that completion shall take place it being of course understood that all the conveyances of the different portions of the property shall be completed on the same day."

The appellant's solicitors did not answer this letter.

On December 6 the appellant's solicitors wrote to the respondents' solicitors:—

"We have to-day handed to Messrs. E. S. Wilson & Sons draft conveyance together with carbon copy for your use and we shall be obliged if you will send same to us at an early date letting us know the date fixed for completion. As our client has a considerable amount of money to find we shall be obliged if you will let us know by return of post the day fixed for completion."

On the same day Messrs. E. S. Wilson & Sons returned to the appellant's solicitors the draft conveyance to the appellant with a request that the same be approved and sent back to them on that day, and that request was complied with.

On December 8 the respondents' solicitors replied to the letter of December 6 as follows:—

"In answer to your letter of the 6th inst. we saw Messrs. E. S. Wilson & Sons yesterday who handed us your draft conveyance together with carbon copy for our use for which we thank you. With regard to the completion as all the sub-sales must be completed on the same day and we have not yet received draft conveyances from some of the sub-purchasers you will see

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it is impossible at the present moment to name an exact day for completion and we think we had better arrange to give you say a fortnight's notice of the day."

On December 12 the appellant's solicitors wrote to the respondents' solicitors:—

"With regard to what you state as to completion we beg to point out that it is now more than two months since the date fixed for completion and as it is most important for our client to be in a position to properly work the farm as and from the 1st January we must give you notice that unless you are in a position to complete this purchase on or before the 12th prox. our client will have no course but to take proceedings against you for the return of the deposit of which you are stakeholders and against your clients for interest damages and costs."

At this date all questions of title and conveyancing between the appellant and the respondents had been cleared up.

On December 21 the respondents' solicitors sent the appellant's draft conveyance (which had been in their possession since December 8) to Messrs. Lawrence, Graham & Co., Major Windham's London solicitors, for approval.

On January 18, 1912, the appellant's solicitors wrote to the respondents' solicitors complaining of the delay, which they said was most serious to their client owing to the fact that he was purchasing, as stated prior to the signing of the contract, for the purposes of occupation, and stating that their client reserved his right to take such steps as he might be advised for the rescission of the contract or otherwise. The respondents' solicitors did not reply to this letter.

On January 30 the appellant's solicitors again wrote to the respondents' solicitors as follows:—

"Referring to your letter of the 12th ult. we must now inform you that as every indulgence has been given to your clients in this matter the purchaser's patience is now exhausted. He has been prepared to complete ever since the 11th October and is still ready to do so and we must inform you that unless your clients complete on or before the 13th prox. our client will treat the contract as abandoned on that date and will insist on the return of his deposit interest damages and costs."

On January 31 the respondents' solicitors replied :—

"We are in receipt of your letter of yesterday's date. We have this morning heard from Messrs. Lawrence, Graham & Co. that the draft conveyance herein has been sent to Messrs. Bull & Bull the solicitors for the mortgagees for approval and they have requested them to return it direct to us. We therefore expect that we shall receive it within the next day or two and we will immediately forward it to you. The delay in approving the draft has not been on our part. We sent the draft to Messrs. Lawrence, Graham & Co. on the 21st December and for some time past we have been daily expecting to receive it back from them."

The draft conveyances of the property to all or most of the sub-purchasers were sent back by Messrs. Bull & Bull to the respondents' solicitors, approved on behalf of the mortgagees and of the tenant for life and the trustees of the settlement, on February 6. The draft conveyance to the appellant as so approved was received by his solicitors on February 8, and on the same day the conveyance was engrossed and sent by the appellant's solicitors to the respondents' solicitors with a letter stating that time was of the essence of the contract and that unless completion took place on or before February 13 the appellant would consider the contract abandoned. On February 10 the respondents' solicitors replied :—

"The engrossment you have sent us as you are aware requires execution by eight different parties living in Essex, Kent, Hull, London, Buckinghamshire, Wawne, Andover and Peterborough. It must therefore be obvious to you that all these executions cannot be obtained between the 9th February when we received the engrossment from you and the 13th the date you state in your letter. We propose to complete in Hull on Friday the 23rd inst. and we will let you know the time and the place later."

On February 13, completion not having taken place, the appellant took another farm.

On February 15 the appellant issued the writ in this action against the respondents and Mr. Wheeler, the stakeholder, claiming a declaration that the appellant was entitled to treat

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the contract as at an end and the return of the deposit with interest thereon and damages and costs. The defendant Wheeler, pursuant to an order in the action, paid the deposit into Court, and thereupon all further proceedings in the action were stayed against him.

The respondents by their defence denied that the failure to complete was due to any neglect or default on their part and alleged that the appellant knew it was impossible to procure the execution of the conveyance by all parties on February 13, 1912.

On February 17, 1912, the respondents agreed to resell to Major Windham the property comprised in the agreement of June 8, 1911, for 19,700*l.* The sale to Major Windham and all or most of the sub-purchases were completed on February 23, 1912, and the mortgages for 23,000*l.* and 12,000*l.* were paid off on that day.

At the trial an attempt was made by the respondents to prove by the correspondence and by the oral evidence that the appellant tacitly assented to wait for the completion of all the sub-purchases, but Joyce J. found that this was not established. The evidence on this point is fully set out in the judgment of Lord Atkinson.

Joyce J. found that there never was any arrangement or understanding with the appellant or his advisers that he should wait for the other purchasers, that the respondents had been guilty of excessive delay, and that in all the circumstances of the case the fortnight allowed by the notice of January 30, 1912, was not unreasonable, though he was not prepared to hold that if the appellant was bound to wait for the completion of all the other sub-purchases the time allowed for completion was sufficiently long.

The Court of Appeal (Cozens-Hardy M.R., Buckley and Hamilton L.JJ.) found that the purchaser was throughout the whole transaction depending for the provision of his own purchase-money on the discharge of the Trinity House mortgage by completion of the sub-purchases of the lots upon which the mortgage was secured, and that he must be taken to have assented to all the sub-purchases being simultaneously completed, and in those circumstances they held that the time allowed for completion by the notice of January 30, 1912, was not reasonable.

1914. Nov. 3, 4, 12. *P. O. Lawrence, K.C.*, and *Percy Wheeler*, for the appellant. Having regard to the previous delay of the respondents the notice of January 30 was not unreasonable. The respondents raised no objection to the notice and they made no real attempt to expedite the completion of the sale. The judgment of the Court of Appeal proceeded upon a misapprehension of the facts. There was no ground for disturbing the judgment of Joyce J. upon a pure question of fact.

Hughes, K.C., and *Younger, K.C.* (with them *Sheldon*), for the respondents. The Court of Appeal assumed that there had been excessive delay but held that the time allowed by the notice was not reasonable; but the respondents rely upon both points.

1. As to delay, the delay which gives a right to modify a contract of which time was not originally of the essence must be "gross, vexatious, unreasonable or unnecessary": Fry on Specific Performance, 5th ed., p. 535, par. 1092. It is only in that event that one of the parties can fix a limit of time for the completion of the contract, and then a reasonable time must be allowed: *Green* v. *Sevin*. (1)

[Lord Parker of Waddington. In that case no time was fixed for completion.]

The mere statement of a date for completion is not a part of the contract. Improper delay involves something more than mere lapse of time. There was here no improper delay on the part of the respondents inasmuch as it was due to difficulties in their vendor's title which involved a considerable amount of correspondence. No practical inconvenience was occasioned to the purchaser by the lapse of time.

2. As to the reasonableness of the notice, however much delay there may have been, the peremptory notice for completion must allow a reasonable time, having regard to the facts existing at the date of the notice.

[Lord Parker of Waddington referred to Fry on Specific Performance, 5th ed., p. 537, par. 1097, and *Compton* v. *Bagley* (2) there cited.]

In considering the validity of a notice making time of the

(1) (1879) 13 Ch. D. 589. (2) [1892] 1 Ch. 313.

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essence the primary consideration is what remains to be done and what is a reasonable time for doing it.

[LORD PARMOOR. In *Compton* v. *Bagley* (1) Romer J. was certainly of opinion that the question of the reasonableness of the notice might be influenced by the previous attitude of the parties.]

But the notice must be in a business sense possible. Here it was the common understanding of all parties that the sub-purchases should be executed on the same day and the arrangements made by the appellant for finding the purchase-money proceeded on that basis. Upon that view of the facts Joyce J. agreed that the notice was not reasonable. But, whether it is assumed that all the conveyances were to be contemporaneous or not, completion within the time left by the notice was practically impossible.

[LORD PARKER OF WADDINGTON referred to *Lloyd* v. *Collett* (2), cited in Sugden on Vendors and Purchasers, 14th ed., p. 261.]

The argument that the decision of the Court of first instance upon a question of fact ought not to be lightly disturbed does not apply with the same force where the question depends, not upon the credibility of witnesses, but upon the proper inference to be drawn from the documents. The offer of the respondents to complete by February 23 is also a circumstance to be taken into account. If the Court sees that the means exist of completing within a reasonable time and that the time limited by the notice is not sufficient for that purpose it will not give effect to the notice: *Wells* v. *Maxwell*. (3)

[LORD PARKER OF WADDINGTON. Is not the fact that the vendors have put it out of their power to perform their contract by selling to a third party shortly after the commencement of the action for the return of the deposit fatal to their case?]

Having regard to the provisions of s. 25, sub-s. 7, of the Judicature Act, 1873, that fact is now immaterial.

[They also referred to *Seton* v. *Slade*. (4)]

The House took time for consideration.

(1) [1892] 1 Ch. 313.
(2) (1793) 4 Bro. C. C. 469.
(3) (1863) 33 L. J. (Ch.) 44.
(4) (1802) 7 Ves. 265.

Dec. 11. EARL LOREBURN. My Lords, this case turns on the view which the House may take of the facts, though it is also necessary to say something about the law.

It is an action by a purchaser of some 612 acres of land against his vendors to recover the deposit, upon the ground that after a long delay he gave notice to complete in a fortnight, and the vendors failed to complete. Joyce J. held that he was entitled to recover the deposit. This decision was reversed by the Court of Appeal, who thought that the notice did not, in the circumstances, allow sufficient time. I agree with the judgment of Joyce J., but, in view of the decided opinion expressed by the Court of Appeal, feel it my duty to examine the facts.

Mr. Stickney, the purchaser, was a farmer who intended to quit his farm in April, 1912. Accordingly, on June 8, 1911, he contracted to buy from Messrs. Keeble and Jellett, the now respondents, these 612 acres. The purchase-money was 20,200*l.* The contract named October 11, 1911, as the day for completion. A deposit of 10 per cent. was paid. It was known to the vendors that the purchaser required the land for farming, and April 6, 1912, was the day for giving vacant possession. It is common ground that the purchaser would require to enter before that date for ploughing and other purposes. It was not reasonable that Mr. Stickney should lay out large sums with a view to taking vacant possession in April, 1912, until he could feel certain that his purchase would be completed in good time. Both sides knew that undue delay would be very injurious to him.

It is right to state at the outset that the purchaser, Mr. Stickney, was throughout able and willing to carry out his contract. He could and would have completed on October 11. His solicitor says so, and no witness contradicts him. There is a suggestion about the source from which he was to borrow money, to which I will revert, and which I regard as groundless. No one suggests that he was guilty of any delay or default. All that is said is that in the end his notice to complete did not allow sufficient time.

I now turn to Messrs. Keeble and Jellett, the vendors. These gentlemen were not the legal owners of the land which they

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contracted to sell. In April, 1911, they had contracted to buy from the tenant for life, Major Windham, a large property called the Wawne estate with a view of resale. Part of it was the 612 acres sold to Mr. Stickney. In all there were twenty-three such resales. Messrs. Keeble and Jellett had no conveyance to themselves, and had not approved the title, or even received an abstract, in June, 1911. The Wawne estate was mortgaged, different mortgages affecting different parts of it, and there were some charges affecting parts of it. Also, there were no effective trustees for purposes of the Settled Land Acts. All this, no doubt, may be usual enough, and no real difficulty at any time arose in regard to the title. The importance of it is that when Messrs. Keeble and Jellett sold to Mr. Stickney they had a good deal to do before they could get a title themselves. And as they had twenty-three sub-sales, which naturally they intended to carry through by direct conveyances from Major Windham, and to complete all on the same day so as to apply the money they received in paying the money which they would owe, it was obvious that a good deal of work had to be got through on their side, and a good deal of coming and going, before everything was well over. Now, the view I take of the facts in this case may be put in a sentence. Mr. Stickney was anxious to pay his money and take his land, but his vendors delayed him again and again, because they wanted time to carry through their own engagements with Major Windham and with their twenty-three sub-purchasers so as to complete the whole thing, or as much as possible of it, on the same day. That is my view of the facts, and my view of the law is that Mr. Stickney was not bound to accept that as a justification for delay. Delay so caused must be imputed to Messrs. Keeble and Jellett, not to Mr. Stickney, who was not concerned with the other sub-purchasers.

Let me state briefly why I take this view of the facts. The contractual day for completion, October 11, 1911, passed without notice on either side. Between that date and November 14 Mr. Stickney, through his solicitors, complained that there was delay. Messrs. Keeble and Jellett, through their solicitors, were getting trustees appointed and conveyances prepared. Whether they and the other sub-purchasers and Major Windham's solicitors

were leisurely or not I do not know. But on November 14 Mr. Stickney gave his first notice that he would cancel the purchase unless it was completed in three weeks. This, however, was waived. On December 12 it was admitted that so far as Mr. Stickney's purchase was concerned every question of title was settled between him and his vendors. On that day he gave a second notice that he would cancel unless his purchase was completed on or before January 12, 1912. An entire month was thus allowed, but January 12 passed and Messrs. Keeble and Jellett had not settled with Major Windham and their other sub-purchasers. Mr. Stickney again waived his rights under the notice. He was becoming impatient, not without reason, when his own position is considered. On January 16 his solicitors asked Messrs. Keeble and Jellett's solicitors if there were any questions as to title outstanding between them and Major Windham. The answer sent on January 17 stated that only one question was outstanding, relating to the repair of a river bank, and that this could be dealt with after completion. In fact I think it did not affect the lands bought by Mr. Stickney. Another letter was written by Mr. Stickney's solicitors bitterly complaining of delay, without producing any result, and on January 30 they gave the notice which the Court of Appeal held to be unreasonable, that they would cancel unless Messrs. Keeble and Jellett completed on or before February 13. It was their third notice of the kind.

This January notice left fourteen days for the vendors to prepare themselves. When I am asked to say that this time was insufficient I must see what had to be done within the time. The draft conveyance had to be approved by the mortgagees' solicitors, Messrs. Bull & Bull. It had also to be engrossed and executed by eight persons living in Essex, Kent, Hull, London, Buckinghamshire, Wawne, Andover, and Peterborough. First, take the obtaining of Messrs. Bull & Bull's approval. That ought, so far as Mr. Stickney's draft was concerned, to have been done long before. This draft was received by Messrs. Keeble and Jellett's solicitors and forwarded by them to Major Windham's solicitors on December 21, 1911, with a request to forward it to Messrs. Bull & Bull. This was not done till

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January 30, and then it was forwarded with some of the other draft conveyances to the other sub-purchasers. Messrs. Bull & Bull did not approve it till February 7. On February 8 it was received by Mr. Stickney's solicitors approved. They had it engrossed instantly, and on February 9 it was in the possession of Messrs. Keeble and Jellett's solicitors. Only four days were left before February 13 to obtain the execution of the eight persons living in the places I have named. That was a short time. If it was too short a time, that was not the fault of Mr. Stickney. It was because others failed to procure the necessary approval in time. Am I to say that what otherwise would have been a reasonable time to get the deed executed by eight persons becomes unreasonable because the vendors or other persons for whom they are responsible have occupied on other matters a month or six weeks, and so left more to be done within the time fixed by the notice? If that were accepted, then the more lax a vendor is, the longer is the time which must be allowed him by the purchaser. With all respect I must decline that view. In my opinion the fourteen days allowed for the notice were sufficient if Messrs. Bull & Bull's approval had been obtained to this draft in time. I am not prepared to say it was unreasonable under the circumstances, even if time had to be allowed for getting Messrs. Bull & Bull's approval, though it would have been a tight fit. People who are behind time in the transaction of business must expect such pressure. It was admittedly not a reasonable time to complete all the twenty-three purchases, or even the eighteen or nineteen of them which were, in fact, concluded on February 23. But Mr. Stickney was not bound to wait the convenience of his vendors in carrying out their transactions with other people, unless he had either agreed to do so or led his vendors to believe that he would do so by his own statements or his own conduct. In the end the respondents' argument resolved itself into a contention that Mr. Stickney had, in fact, led the vendors to believe this, and that they had acted upon this belief. And that also is the substance of the judgments delivered in the Court of Appeal, as I read them.

My Lords, I cannot assent to this contention. It is based upon two letters. One of them, dated December 1, 1911, was written,

not by the vendors' solicitors, but by the life tenant's solicitors to Mr. Stickney's solicitors. It enclosed a draft form of conveyance and contained these words: "It being, of course, understood that all the conveyances of the different portions of the property shall be completed on the same day." No answer was sent to that letter. But when, on December 8, the vendors' solicitors wrote to Mr. Stickney's solicitors, they said: "With regard to completion, as all the sub-sales must be completed on the same day and we have not yet received draft conveyances from some of the sub-purchasers, you will see that it is impossible at the present moment to name an exact day for completion." In answer to that letter Mr. Stickney's solicitors wrote on December 12 complaining of the delay and stating the importance of an early settlement and giving notice that unless Mr. Stickney's purchase were completed on or before January 12 he would claim a return of his deposit. An attempt was made to fortify the vendors' contention by some oral evidence. It came simply to this, that Mr. Stickney had no objection to all the completions taking place on the same day provided that his own were not unnecessarily delayed. There is not really anything to show that he led the vendors to think he would be so foolish as to postpone his own urgent requirements till others over whom he had no control, and of whose arrangements he had no knowledge, might be ready to complete.

An attempt was made to show that Mr. Stickney had a very good reason for desiring that all the sub-purchases should be completed on the same day, namely, that otherwise he could not have found the money to pay for the land. It is true that he intended to raise 14,000*l.* for that purpose by loan from the Trinity House, and the Trinity House were mortgagees for 12,000*l.* on some portions of the Wawne estate which were comprised in other sub-purchases as well as Mr. Stickney's. It would no doubt be convenient that these sub-purchases at all events should be completed on the same day as Mr. Stickney's. But no proof whatever was given either that the Trinity House could not have advanced this 12,000*l.* from other resources of their own or that Mr. Stickney could not have procured it from other quarters than the Trinity House. In fact he was not cross-

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examined on this point. It comes to no more than proof that it would have been convenient for some at all events of these sub-purchases to be completed at the same time, which is obvious. I am clearly of opinion that Mr. Stickney at no time gave, either by his statements or by his conduct, any ground for the view that he had consented to delay in order to have completion of other sub-purchases on the same day as his own. On the contrary, he was constantly pressing that his own purchase should be completed, in more letters than those I have mentioned.

In regard to the law I shall say very little, because it is fully dealt with in the opinion of Lord Parker, which I have had the advantage of seeing in print.

I will merely observe that the date fixed for completion in a contract for the sale of land is no less a part of the contract than any other clause, but equity will grant relief where a party seeks to make an unfair use of the letter of his contract in this respect, having regard to the state of the law relating to real property in England. It is safe to say that this relief will always be refused when to grant it would be essentially unfair. In the view I take of the facts, and this is why I have somewhat closely examined the facts, it would be essentially unfair that in this case the vendors, who, either by themselves or by those for whose action they alone are chargeable as against the purchaser, have caused great delay in completion, should be enabled to forfeit the deposit of a purchaser against whom no one has attempted to make good any delay whatever.

I have not expressed, nor, indeed, formed any opinion on the question whether or not the time taken by the solicitors for the vendors, or the tenant for life, or the mortgagees, or the sub-purchasers other than Mr. Stickney, was too long in the circumstances for what they had to do, because I do not know what difficulties they may have encountered in carrying through rather a large piece of business. What I am satisfied about is that Mr. Stickney's piece of business was in fact unjustifiably delayed by what occurred, and that he was in no sense bound to wait because others did not or could not make progress.

I think this appeal should be allowed.

LORD ATKINSON. My Lords, I concur. It is unnecessary to restate the facts.

The appellant, whose purchase was by the terms of his agreement to be completed on October 11, 1911, weary of the delays which had occurred, served on January 31, 1912, upon the respondents a notice requiring them to complete on or before February 13, 1912, else he would rescind the contract, which, this notice not having been complied with, he accordingly did.

The respondents' contention is that time not having been made of the essence of this contract by the express stipulation of the contracting parties, the nature of the property, or the circumstances of the case, this notice is ineffectual to make it so, inasmuch as the time allowed by it to the respondents to do all that remained to be done by them was, under all the circumstances of the case, unreasonably short.

The appellant, to the knowledge of the respondents, bought the land for the purpose of working it as a farm. He was to go into full possession and enjoyment of it on April 6, 1912, and I am by no means sure that time was not of the essence of the contract to this extent, at all events, that the purchase should be completed at such a time before that date as would leave an interval reasonably sufficient for the preparations necessary to enable him to so enter upon the land and use it. This point, however, was not fully dealt with in the evidence, and I pass it by. There is no occult or elusive mystery hidden in the phrase, "in equity time is not of the essence of the contract." It merely expresses in a condensed form the doctrine that if a Court of Equity, looking not at the letter but at the substance of a contract to purchase land, sees that in none of the three ways above mentioned is an intention disclosed that the time limited for completion, or for any step towards completion, is to be strictly adhered to, that Court will relieve against breaches through mere lapse of time touching these matters when that can be done without substantial injustice: *Roberts* v. *Berry*. (1)

The jurisdiction exercised by a Court of Equity in this matter is very much akin to that exercised by it in relieving against forfeitures, or in permitting the redemption of mortgages after

(1) (1853) 3 D. M. & G. 284.

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the estate of the mortgagee has, according to the letter of his contract, become absolute at law. In *Tilley* v. *Thomas* (1) Lord Cairns and Rolt L.J. deal with the doctrine thus :—

Lord Cairns, at p. 67, says: "The legal construction of the contract is, in my opinion, such as I have expressed, and the construction is, and must be, in equity the same as in a Court of law. A Court of Equity will indeed relieve against [*sic*], and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps toward completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts* v. *Berry* (2)) there is nothing in 'the express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract."

And Rolt L.J., at p. 69, says: "Now, as a matter of construction merely, I apprehend the words must have the same meaning in equity as at law. The rights and remedies consequent on that construction may be different in the two jurisdictions, but the grammatical meaning of the expression is the same in each. And if this be so, time is part of the contract, and if there is a failure to perform within the time the contract is broken in equity no less than in law. But in equity there may be circumstances which will induce the Court to give relief against the breach, and sometimes even though occasioned by the neglect of the suitor asking relief. Not so at law. The legal consequences of the breach must there be allowed strictly to follow. The defendant is entitled to say that the contract is at an end, and it is in this sense, I apprehend, that in such cases it is said that time is of the essence of the contract at law, though not necessarily so in equity. The language of Lord Redesdale in *Lennon* v. *Napper* (3), cited by Lord Justice Knight Bruce in *Roberts* v. *Berry* (2), fully explains my view on this part of the case."

In *Tilley* v. *Thomas* (1) the defendants purchased a house for a

(1) (1867) L. R. 3 Ch. 61. (2) 3 D. M. & G. 284.
(3) (1802) 2 Sch. & Lef. 682.

residence, possession (i.e., possession with a good title) had to be delivered to him on a certain day, and it was held that these circumstances showed that it was the intention of the parties that time should be of the essence of the contract and the bill of the vendor for specific performance was dismissed.

Again, at law if a vendor of land, on the contract being repudiated by the purchaser on the day named for completion, sued for damages for breach of contract, he would have been obliged to aver and prove that he was on that day ready and willing to convey, which involves that he had a good title on that day. If he could not do this he could not sue, because he could not do that which is a condition precedent to the performance of the contract by the purchaser. See James L.J., *Noble* v. *Edwardes*. (1)

Similarly if the vendor of an estate should not have a clear title by the day specified, the purchaser may at law rescind the contract and recover back his deposit, without waiting to see whether the vendor may ultimately be able to establish a good title: *Wilde* v. *Fort*. (2) Sect. 25, sub-s. 7, of the Judicature Act, 1873, has a bearing on this authority and was relied on.

In *Howe* v. *Smith* (3) the purchaser on entering into the contract paid 500*l*. as a deposit and in part payment of the purchase-money. The contract contained a condition very similar to condition No. 15 in the present case. The purchaser was guilty of so many delays as to amount to virtual repudiation of his contract.

The vendor, on June 20, 1880, warned the purchaser that unless he completed within a month the vendor would sell the property. On July 25 the purchaser instituted a suit for specific performance of the contract. On July 31 the vendor, before he had delivered a defence justifying a rescission of the contract, resold the property to a third person at the original price. The Court of Appeal held that the purchaser was not entitled to a decree for specific performance, but allowed the statement of claim to be amended by adding a claim for a return of the deposit, and ultimately held that, notwithstanding that

(1) (1877) 5 Ch. D. 378, at p. 393. (2) (1812) 4 Taunt. 334.
(3) (1884) 27 Ch. D. 89.

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the deposit was to be taken in part payment of the contract price, it was also a guarantee for the due performance of the contract, and that as the purchaser was in default the resale gave him no rights, and that he could not recover back his deposit.

Fry L.J. alone amongst the learned Lords Justices dealt with the question whether under s. 25, sub-s. 7, of the Judicature Act, 1873, the rule of law, as distinguished from the rule in equity, still prevails, and at p. 103 came to the conclusion that the effect of the sub-section is that a purchaser seeking damages need no longer prove his readiness and willingness to complete on the day named, but may still recover if he can prove his readiness and willingness to complete within a reasonable time after that day. The same rule would, of course, apply to the case of a vendor suing for damages. If this decision be right, as I am inclined to think it is, the law laid down in *Tilley* v. *Thomas* (1) and in *Noble* v. *Edwardes* (2) is to this extent modified.

I feel, myself, quite unable to assent to the two propositions following, which, as I understood, were laid down by Mr. Hughes :—

(1.) That no matter how distant the day may be which is fixed for completion by the parties to a contract for the sale and purchase of land—though, indeed, it be measured by years—a vendor who takes no steps to complete within that lengthened period is, in order to make time of the essence of the contract, entitled to notice giving him a reasonable time after its termination to do all he had left undone.

(2.) That where no time for completion is fixed in the contract and the law imports into it a provision that it is to be completed within a reasonable time, this reasonable time is not of the essence of the contract in equity, so that a defaulting vendor may do nothing to complete during its currency and be yet entitled to get a reasonable time after its termination to do all that the law intended he should do while it was running. If I misunderstood him I apologize.

I think the authorities I have cited show that these propositions are untenable.

(1) L. R. 3 Ch. 61. (2) 5 Ch. D. 378.

Mr. Younger, in arguing for the respondents, put his contention, as I understood him, thus: There was, he said, an understanding between the parties, not amounting to a contract because made without consideration, but definite and clear, that the purchaser should procure the purchase-money, and the contract for sale should be completed in certain ways, for which preparations had been made, and that it was unreasonable and unfair on the part of the appellant to require that those modes of procedure should be abandoned, and the purchase completed in wholly different ways, for which few, if any, preparations had been made, in the short period of fourteen days. I am not quite sure that he did not contend further that if the modes of procedure first contemplated were not followed the purchaser should in this case be held to have been unable to find the purchase-money, and therefore unable to complete.

Joyce J. was of opinion that if the modes of procedure so alleged to have been understood and assented to by the plaintiff were to be followed, the time given for completion was unreasonably short.

The Court of Appeal agreed with him. I, myself, see no reason to dissent from that view; but the Court of Appeal went further, and, as I understand their judgments, held that the appellant had assented to the contract being carried out in the ways alleged to have been arranged, and that it was because he had done so that his notice requiring his own purchase to be completed within fourteen days, irrespective of the completion of all the other contracts of purchase, was unreasonable.

It is in this last conclusion I am, with all respect, quite unable to concur. I do not think there is any satisfactory evidence whatever that the appellant ever came to any understanding such as is suggested, amounting either to this, that the appellant would not require his agreement to be completed before the agreements of all the other sub-purchases, twenty to twenty-five in number, were completed, no matter how long that operation might take; or to this, that the completion of the appellant's purchase was to be postponed till a reasonable time had elapsed for the completion of all the other contracts.

If the appellant had entered into such an arrangement he

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would have been perfectly entitled to withdraw his consent. The complaint against him is that he withdrew his consent too suddenly and gave no reasonable time for a change of plan. It is, I think, plain that if he ever gave his consent he withdrew it on December 12, 1911, not on January 30, 1912, as is alleged, but over six weeks before that date.

If the appellant did come to this understanding on the terms I have sketched, it would have been a most unwise step for him to have taken, for it loses sight of the vital date, April 6, when he was to take possession of this farm. No stipulation was in this arrangement contained touching that event, so important to him, and for which he must necessarily make preparations.

Turning first to the documentary evidence by which the supposed arrangement or understanding is claimed to have been proved, one finds that on November 14, 1911, the appellant's solicitors wrote to the respondents' solicitors, that unless a day not later than three weeks from that date was fixed for completion, the appellant would cancel the contract and claim a return of the deposit and interest.

The receipt of that letter is acknowledged next day. Some excuses are made for delay, but no protest. The three weeks named would be up on December 5 following. It having been suggested that, to save stamp duty and other expenses, the conveyance to the sub-purchasers should be made direct from Major Windham, the respondents' vendor, a letter was sent by that gentleman's local solicitors to the appellant's solicitors, dated December 1, 1911, in which the following passage occurs: "We have numbered the drafts in the order that we propose that completion shall take place, *it being, of course, understood that all the conveyances of the different portions of the property shall be completed on the same day.*" The italics are mine. Understood by whom he does not say.

It may well be that this arrangement would have suited admirably the convenience of the respondents, for the only way they had of paying Major Windham was by appropriating to him the necessary portion of the purchase-money of the sub-lots. This is the very first mention of the matter contained in any written communication to the appellant or his solicitors.

On December 6, four days after the receipt of this letter and one day after the expiry of the three weeks given for completion, the appellant's solicitors wrote to the respondents' solicitors a letter, in which not a word is mentioned about the postponements of the completion of the appellant's purchase. It contained however, the very significant passage following: "As our client has a considerable amount of money to find we shall be obliged if you will let us know by return of post the date fixed for completion."

In reply to this letter the respondents' solicitors wrote on December 8, 1911, to the appellant's solicitors a letter containing the following passage: "With regard to completion, as all the sub-sales must be completed on the same day, and we have not yet received draft conveyance from some of the sub-purchasers, you will see that it will be impossible at the present moment to name an exact day for completion, and we think we had better arrange to give you a fortnight's notice."

Now, that is the first communication touching this matter which passed between the respondents' solicitors and the appellant's solicitors. That letter was answered on December 12 in a letter which, so far from amounting to an acquiescence in the proposed arrangement, is, in effect, a protest against it, and a threat to take proceedings for the recovery of the deposit if the appellant's own purchase be not completed on or before January 12, 1912. The letter is most important. The relevant portion of it runs thus: "With regard to what you say as to completion, we beg to point out that it is now more than two months since the date fixed for completion, and as it is most important for our client to be in a position to properly work the farm as and from the 1st of January, we must give you notice that unless you are in a position to complete *this purchase* on or before the 12th prox., our client will have no other course but to take proceedings against you for the return of the deposit of which you are stakeholders, and against your clients for damages and costs." By the words "this purchase" is obviously meant the appellant's own purchase.

My Lords, it appears to me inconceivable that these solicitors should ever have written a letter such as this if they had, on

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behalf of their client, previously arranged that the completion of his purchase should await the completion of those of all the other sub-purchasers. If the arrangement suggested was made at all it must have been made through these gentlemen, not directly with their client. It would, in my view, be difficult to pen a letter more absolutely inconsistent with the previous existence of the suggested understanding.

The receipt of this letter is acknowledged next day. I pass by the letter of the appellant's solicitors of January 16, 1912, as it is entirely irrelevant on this particular point.

The next letter from the appellant's solicitors to the respondents' solicitors is dated January 18, 1912.* It contains the following passage: "We are very surprised at the delay in this matter, which, as it has been pointed out to you before, is most serious to our client, having regard to the fact that he is purchasing, as stated prior to signing of the contract, for the purposes of occupation, and our client reserves his right to take such steps as he may be advised for the rescission of the contract or otherwise."

That letter is not replied to, and then the letter of January 30, 1912, is written stating that the appellant is now, and has been from October 11, ready to complete, and that unless the respondents complete on or before February 13, 1912, the appellant will treat the contract as at an end, and sue for the deposit. Well, these two letters seem to me to be almost as inconsistent with the existence of any understanding or arrangement as that of December 12.

This letter of January 30 was answered on the following day. Then, if ever, was the time for the respondents' solicitors to have protested against what is now described as a violation of the arrangements that had been come to. Yet there is not a word of remonstrance or complaint. Not a word as to the departure from the alleged understanding having deranged the respondents' plans, or imposed new difficulties in the way of completion. These things are never alluded to. Nay, more. On February 14 the respondents' solicitors write in reply to the letters of February 12 and 13 from the appellant's solicitors, which declared the contract was at an end and asked them to accept service of a

writ, but that letter of the 14th contains no protest as to broken faith or a violated arrangement. The appellant's attitude is, no doubt, said to be most unreasonable; that is all. Excuses for the delay are put forward, the number of persons who should sign the engrossment, &c., and it is stated that it was only by the utmost exertions they could get their signatures by February 23, but no definite promise was made to complete on that day. It was also intimated they would on behalf of their clients accept service of a writ and bring an action for specific performance. Still nothing about derangement of plans creating new impediments in the way of completion. Well, they did not take these proceedings. They disabled themselves from taking them, for on February 17 they contracted to sell the farm to Major Windham at a lesser price, and executed the conveyance to him on February 23.

The respondents delivered their statement of defence in this action on May 10, 1912. In the sixth paragraph they purport to set out all the particulars of the arrangements as to a direct conveyance from Major Windham to the appellant. In the seventh the particulars as to what took place between February 8 and 13, 1912. In the ninth they say that the repudiation was wrongful, but it is not stated that it was done in violation of any arrangement whatever.

Thus this matter stands on the documents. Now I turn to the parol evidence. At pp. 163, 165, and 171 of the Appendix, in the cross-examination of Mr. G. G. G. Wheeler, a member of the respondents' firm of solicitors, the matter is referred to. The result of his evidence is that he arranged with Major Windham's solicitors that, for the convenience, he said, of all parties, a large number of the sub-purchases should be completed on the same day, but he does not say he made that arrangement with the appellant's solicitors.

In the cross-examination of Mr. J. E. D. Stickney, the brother of the appellant and a member of the firm of his solicitors, at p. 137, the matter is carried a little further. He was asked, "Were there not a good many parties to the sale and a good deal of difficulty in getting it through?" And his reply was, "The twenty-three completions on the same day was the difficulty."

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It was part of the difficulty because they were trying to arrange to save stamp duty and all sorts of things, and have one transaction instead of two. He knew this.

He was then asked, "And had you assented to it?" And he replied, "In reason, within a reasonable time." He is again asked, "And you assented to it?" He replied, "The usual custom." He was then asked, "It is the natural thing to do? That did, to your knowledge, make it more difficult and troublesome?" He replied, "Not from my point of view; it was no more difficult and troublesome." He was then asked, "From the point of view of the vendor if you like?" And replied, "Yes, I think it had been." That is the whole of the parol evidence dealing with the subject.

In the face of the correspondence I have referred to, I feel myself quite unable to hold that the appellant entered into an arrangement to the effect that the completion of his contract of purchase should be postponed either indefinitely, or for a time reasonable for the purpose of enabling all the contracts of the sub-purchasers to be completed on the same day, or that even if he did so the respondents were, after the letter of his solicitors of December 12, 1911, already referred to, entitled to rely upon his acting longer on any such understanding. The appellant's right and the respondents' correlative obligation to have this contract of purchase completed were, therefore, in my view, at least from that day (December 12) if not before, entirely unaffected by the supposed arrangement. And I further think that the correspondence shows that the respondents did not in fact rely upon it.

It is no doubt quite true that the appellant contemplated finding 14,000*l.* to complete his purchase by a loan from Trinity House of that sum, to be secured by mortgage on the farm purchased. And it is also true that it was contemplated that this advance should be made when the mortgage on part of Major Windham's estate for 12,000*l.*, which Trinity House held, had been paid off, and further that this mortgage was only to be paid off out of the purchase-money paid by the sub-purchasers.

That no doubt was the permanent arrangement which the appellant designed to carry through, but it by no means follows

that pending the carrying of it through he could not have obtained from other sources a temporary advance of 14,000*l.* on the security of his agreement, in order to complete his purchase, the permanent arrangement being subsequently carried out. That would be a species of transaction which is, I should think, of daily occurrence. There was no difficulty whatever about it, yet it is, apparently, assumed that because he could not procure the money in the way contemplated before all the other purchases were completed he could not obtain it in any other way.

The appellant, though examined as a witness, was not asked a single question on this point, neither was Mr. Stickney, his brother. Under these circumstances, I think, it would be wholly illegitimate to conclude that the appellant was not ready and willing to complete, as he said he was, from October 18, 1911, onwards. Neither do I think that the fact that the appellant entered into this arrangement with Trinity House is any proof whatever that he had consented to the postponement of the completion of his own purchase till all the others were completed.

On the whole, therefore, I am of opinion that the appellant has not been in any way in default. He has waited for four months to have his contract carried out. During that long period he has been, at once, patient and pressing. There was much delay, but that was not due to him, or to anything he did or for which he is responsible. It is due, I think, in the main to this, that the respondents sold, as owners, property that did not belong to them, property that they had, no doubt, agreed to buy, but had not the money to pay for, money which they could only obtain from the sub-purchasers of the estate as these latter contracts of purchase were completed.

It would, in my view, be quite unjust to allow the respondents to retain money deposited as a guarantee for the due performance of the very contract which they themselves, not the depositor, have failed to perform. As in *Howe* v. *Smith* (1) the purchaser who was in default could not get back his deposit because of his default, so here the vendors, who are in default, should not be permitted to retain the deposit since they are in default.

I concur with Joyce J. in thinking that the fourteen days

(1) 27 Ch. D. 89.

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allowed by the notice of January 30 was quite a reasonable time for the completion of the appellant's own contract, independently of the others, and am of opinion that the decision of that learned judge was right and should be upheld, that the decision of the Court of Appeal was erroneous and should be reversed, and this appeal be allowed with costs here and below.

LORD MERSEY. My Lords, this appears to me to be a fairly simple case. The plaintiff was a farmer and about to quit his farm. The defendants were land speculators. They had bought a large estate at a cost of about 80,000*l.* which they wished to sell in small lots so as to realize a profit. On June 8, 1911, the plaintiff bought one of these lots, agreeing to pay 20,200*l.* for it. He made this purchase, as the defendants knew, in order to provide himself with another farm in which to continue his business. Under the terms of the contract the completion was fixed for October 11, 1911.

It appears that part of the estate bought by the defendants was in mortgage to the Hull Trinity House for a sum of 12,000*l.* This part of the property did not comprise any of the portion bought by the plaintiff. It was thought that when a buyer for this part of the property should be found he might wish to pay off the 12,000*l.* mortgage. The plaintiff desired to raise a mortgage of 14,000*l.* on the farm which he was buying, and accordingly he arranged with the Trinity House that if and when that body received the 12,000*l.* they should lend it to the plaintiff together with 2000*l.* more on mortgage of the plaintiff's purchase. This arrangement was known to all parties. When the contract date for completion arrived the defendants were not in a position to give a title.

The plaintiff, who was a willing and in fact an anxious purchaser, waited patiently, or perhaps I ought to say impatiently, for a title until January 30, 1912. His solicitor then wrote the letter of that date giving notice to the defendants that unless they completed by February 13 (that is to say in fourteen days) the plaintiff would treat the contract as abandoned and would require a return of his deposit—a sum of 2020*l.* Between the date of the plaintiff's contract and the date of this notice the

defendants had sold the remainder of the large estate in about twenty or more parcels to different buyers, and shortly before the service of the notice they had written to the plaintiff to say that it was their intention to complete all the sales on one day. The plaintiff when acknowledging the receipt of these letters had made no comment on this statement. The fourteen days ran out and the defendants were still not ready to complete. This action was then commenced by the plaintiff for the purpose of recovering back his deposit. It is in these circumstances that the question has arisen whether the notice served by the plaintiff was sufficient in length of time. The plaintiff contends that he was in no way concerned with the completion of the titles of the other twenty purchasers and that a notice which afforded enough time for the completion of his own title was a sufficient notice for him to give to the defendants. On the other hand the defendants say that the plaintiff was bound to give such a notice as would afford time to complete all the purchases and that the notice of January 30—a fourteen-day notice—was not sufficient for that purpose. It may, I think, be assumed that if the defendants' view of the position is the right one the notice was not sufficiently long. Joyce J. was of opinion that the plaintiff's view was the right view; that he was not affected by the transactions with the other purchasers, and that it was enough if he gave a notice sufficient with regard to his own title alone. He held that the notice was sufficient for that purpose and he gave judgment accordingly. The Court of Appeal took a different view and gave a judgment which has had the effect of forfeiting the plaintiff's deposit.

My Lords, I am of opinion that Joyce J.'s judgment was right. After the long delay which had taken place the plaintiff had a right to make time of the essence of his contract by serving the defendants with a notice sufficient in point of time to enable them to complete his title, and he could only be deprived of this right by contract or by conduct of his own which would make it unfair for him to insist upon his right. It is admitted that there was no contract which would deprive him of his right. It remains therefore only to consider whether he was guilty of any conduct which deprived him of it; in other words whether he had created

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anything in the nature of an estoppel which precluded him from asserting his right. It is said that he had: first, by letting it be known that he was looking to the Trinity House money to enable him to complete, which money would not be available until the other purchasers (or at all events until some of the other purchasers) had completed their purchases, and, secondly, by his silence when he received the letters saying that all the purchases were to be completed on one day. I think these points taken separately are bad, and I do not think that they are improved by being put together. The defendants knew as men of business that it was of great importance that the plaintiff should have completion quickly. They knew that he had been insisting on completion for many months. They had neither any right to assume nor in my opinion any ground for assuming that the Trinity House was the only source from which he could obtain the money necessary to enable him to complete his purchase, and his omission to answer the observations in the defendants' letters amounts, in my opinion, to nothing. The plaintiff was of course quite willing that all the conveyances should be completed on one day. It was a reasonable suggestion and was consistent with a due regard for his rights. He was not bound to assume that the completion of the other titles could not be effected within a time which would be reasonable with reference to his own title alone. He knew nothing about the other titles. Further, there can be nothing in the nature of an estoppel if the conduct which is said to constitute it neither misleads nor deceives the person alleged to be affected. Here it is abundantly clear that the defendants never supposed that the plaintiff was losing or diminishing his rights by his silence. When they received the notice of January 30 they did not object that the plaintiff was not giving time enough. There was no suggestion then or at any time before action that he had come under some kind of obligation to afford time for the completion of twenty other titles besides his own. Nor is such a point to be found in the pleadings. The answer to the notice consisted merely of an attempt to shift the blame for the delay which had already taken place on to the shoulders of others. They knew well that the plaintiff was impatiently waiting for his title to be completed, and it is

impossible to suppose that they believed that he was gratuitously creating a fresh excuse for delay. I think Joyce J. was right when he said that the defendants acquiesced in the notice of January 30. They did. They read it and understood it in the sense in which your Lordships now read it, and in my opinion the contention put forward at the Bar is a mere afterthought.

It was argued on behalf of the defendants that even if they were wrong in saying that they were entitled to a notice which would enable them to complete all the titles, still the notice given was not sufficient to enable them to complete the plaintiff's own title. That question is one of pure fact. It was not material from the point of view of the Court of Appeal to consider it and they did not consider it. But Joyce J. did consider it with great care. He is a judge of large experience in such matters, and I think it is quite impossible to interfere with his judgment on that point.

I may add that I have read the judgments pronounced and about to be pronounced by the other noble and learned Lords who heard the appeal and that I entirely agree with them.

LORD PARKER OF WADDINGTON. (1) My Lords, in a contract for the sale and purchase of real estate, the time fixed by the parties for completion has at law always been regarded as essential. In other words, Courts of law have always held the parties to their bargain in this respect, with the result that if the vendor is unable to make a title by the day fixed for completion, the purchaser can treat the contract as at an end and recover his deposit with interest and the costs of investigating the title.

In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure.

This is really all that is meant by and involved in the maxim

(1) Read by Lord Parmoor.

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that in equity the time fixed for completion is not of the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract.

It should be observed, too, that it was only for the purposes of granting specific performance that equity in this class of case interfered with the remedy at law. A vendor who had put it out of his own power to complete the contract, or had by his conduct lost the right to specific performance, had no equity to restrain proceedings at law based on the non-observance of the stipulation as to time.

My Lords, this is an action by a purchaser for return of his deposit and other relief, based upon the failure by the vendor to observe the stipulation as to the date of completion, and it will, I think, tend to simplicity if the matter be first considered irrespective of the changes introduced by the Judicature Acts. Prior to these Acts the vendor could have only obtained relief from the consequences of his failure by filing a bill for specific performance and for an injunction restraining the action. On such a bill he could have obtained no relief unless he were himself able and willing to make a title to the purchaser. It appears, however, that almost immediately after the institution of the action the vendor had put it out of his power to complete the sale by reselling the property to a third party, and under these circumstances there could be no question of specific performance, and, therefore, no injunction restraining the action. It seems to me that on this ground alone the bill must have failed. An injunction, if granted, would not have been incident to, and in aid of, the equitable remedy of specific performance, but a means of enabling the vendor to forfeit the purchaser's deposit, in other words, to exercise a right which, if it existed at all, was a legal right, and this would be contrary to the principles upon which the Court of Chancery has always acted.

Counsel for the respondents in effect admitted this, but relied on s. 25, sub-s. 7, of the Judicature Act, 1873, which provides that "Stipulations in contracts as to time or otherwise which would not before the passing of this Act have been deemed to be or have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity." They argued that under this section it is only necessary to consider whether, at the date of the institution of the action, time would in equity have been considered of the essence, and that the subsequent act of the vendor, whereby he put it out of his power specifically to perform the contract, was immaterial.

My Lords, I cannot give to the section in question the interpretation for which the respondents contend. It means, in my opinion, that where equity would prior to the Act have, for the purposes of decreeing its own remedies, disregarded a stipulation as to time and restrained an action at law based on the breach thereof, the Courts constituted by the Act are for the purpose of giving common law relief to disregard it in like manner. In considering whether it would give relief by restraining proceedings at law the Court of Chancery took cognizance of everything which had happened up to the date of the decree, and in applying s. 25, sub-s. 7, of the Act, everything up to the date of judgment ought, in my opinion, to be similarly taken into account. The section cannot in my opinion mean that the rules as to time laid down by Courts of Equity in certain cases, for certain purposes, and under certain circumstances only, shall be applied generally and without inquiry whether the particular case, purpose, or circumstances are such that equity would have applied the rules. If since the Judicature Acts the Court is asked to disregard a stipulation as to time in an action for common law relief, and it be established that equity would not under the then existing circumstances have prior to the Act granted specific performance or restrained the action, the section can, in my opinion, have no application, otherwise the stipulation in question would not, as provided in the section, receive the same effect as it would prior to the Act have received in equity.

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My Lords, the above considerations appear to me to be sufficient to dispose of this appeal, but Joyce J. decided the case on somewhat different grounds. He came to the conclusion that, irrespective of the resale of the property, equity would not, after the expiration of the notice of January 30, 1912, have decreed specific performance or restrained the action at law because of the vendor's delay, and that therefore, notwithstanding s. 25, sub-s. 7, of the Judicature Act, 1873, there was no defence to the action. I agree with every word of Joyce J.'s judgment, both in his findings of fact and his statement of the law applicable to the case. As to the law, however, I desire to add a few remarks. Even in cases when the time fixed for completion is not in equity of the essence of the contract, the vendor's conduct may disentitle him to equitable relief, and in order to ascertain whether he is so disentitled his conduct both before and after the day fixed for completion must be considered. The purchaser's conduct is also relevant, for a delay by the vendor without remonstrance from the purchaser is far from having the same effect as a similar delay in spite of such remonstrance. Thus in *Lloyd* v. *Collett* (1) between August 10, 1792, the date of the contract, and March 25, 1793, the date fixed for completion, the vendor had taken no step to make out his title, though the purchaser had previously applied for the abstract. Shortly after March 25, 1793, the purchaser applied for a return of his deposit with interest, and repeated such application many times before June 10, 1793, when he commenced an action to recover it. It was held that, though time would not otherwise have been held of the essence of the contract, the vendor was disentitled to specific performance, and therefore could not restrain the action at law.

Again, although the vendor's conduct may not, under the circumstances, be alone sufficient to disentitle him to specific performance, yet if he has been guilty of unnecessary delay, and the purchaser has served him with a notice limiting a time at the expiration of which he will treat the contract at an end, equity will not, after the expiration of such time, provided it is a reasonable time, enforce specific performance or restrain an action at law. The time limited by such a notice is sometimes

(1) 4 Bro. C. C. 469.

referred to as having become, by virtue of the notice, of the essence of the contract. In considering whether the time so limited is a reasonable time the Court will consider all the circumstances of the case. No doubt what remains to be done at the date of the notice is of importance, but it is by no means the only relevant fact. The fact that the purchaser has continually been pressing for completion, or has before given similar notices which he has waived, or that it is specially important to him to obtain early completion, are equally relevant facts: *Macbryde* v. *Weekes*. (1) Indeed, the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do. It would be unjust and inequitable to allow the vendor to put forward his own unnecessary delay in the face of the purchaser's frequent requests for expedition as a ground for allowing him further time or as rendering the time limited by such a notice as that to which I have referred an unreasonable time.

In the present case I am of opinion that the time limited by the purchaser's notice of January 30, 1912, was, under the circumstances, a reasonable time. The purchaser had continually pressed for completion. He had previously served similar notices which he had waived. It was of the utmost importance to him to complete the purchase as early as possible in order that he might, under the power reserved in the tenancy agreements, enter and cultivate the arable lands comprised in the purchase. And, in spite of all this, though nothing but the approval, engrossment, and execution of the draft conveyance remained to be done, the vendor had for some six weeks delayed to take proper measures to obtain such approval. A great point was made as to the impossibility at the date of the notice of obtaining such approval and getting the approved draft engrossed and executed within the time limited by the notice. Joyce J., who has had great experience in conveyancing matters, held that all this could have been done within the time limited, and I respectfully agree with him. When the vendor resold the property to a third party there seems to have been no difficulty in completing the contract within six days, one of which was a Sunday.

(1) (1856) 22 Beav. 533.

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Lord Parker of Waddington.

My Lords, I must now refer to the decision of the Court of Appeal, which turned on the facts rather than the law. The farms contracted to be sold formed part of an estate known as the Wawne estate, which the respondents had contracted to buy from Major Windham, the tenant for life thereof, but which had not yet been conveyed to them. They had, pending the completion of their own contract, sold the greater part of this estate to numerous sub-purchasers, of whom the appellant was one, and the appellant appears to have agreed to accept a conveyance from Major Windham and his trustees, with the concurrence of certain people who were entitled to a mortgage on the property. On December 8, 1911, the respondents' solicitors wrote to the appellant's solicitors stating that, as all the sub-sales must be completed on the same day and they had not yet received draft conveyances from some of the sub-purchasers, it was impossible to fix a day for completion. In answer to this the appellant's solicitors on December 12 wrote as follows :—

"With regard to what you state as to completion, we beg to point out that it is now more than two months since the date fixed for completion, and as it is most important for our client to be in a position to properly work the farm as and from the 1st of January, we must give you notice that, unless you are in a position to complete this purchase on or before the 12th prox., our client will have no course but to take proceedings against you for the return of the deposit of which you are stakeholders, and against your clients for interest, damages, and costs."

The prima facie meaning of this letter seems to be that whether or not it be possible to complete all the sub-purchases on January 12, the appellant must have his conveyance completed on that day, or would otherwise rescind the contract. The Court of Appeal, however, came to the conclusion that this prima facie meaning must be rejected, and that the letter really meant that unless all the sub-sales were completed by the day named the purchaser would rescind, and they attach the same meaning to the word completion in the subsequent correspondence. They appear to have been mainly influenced by the following considerations. The appellant undoubtedly contemplated raising a

sum of 14,000*l.* upon mortgage of the farms he had purchased, and he had approached Trinity House, Hull, with a view to their advancing this sum. Trinity House was entitled to a mortgage for 12,000*l.* on other parts of the Wawne estate, and this mortgage was to be paid off out of the purchase-money which the respondents had to pay to Major Windham's trustees. They also had in hand a further 2000*l.* in cash. They consented, therefore, to make the advance which the appellant required. The Court of Appeal assumed that the appellant could not complete without the assistance of this advance, that Trinity House could not make the advance unless the 12,000*l.* mortgage were paid off by the respondents, that the respondents could not pay off the 12,000*l.* mortgage till the completion of the sub-purchases, and that therefore all parties must have contemplated that all the sub-sales would be completed on the same date, so that where completion is referred to in the correspondence it must be taken to mean completion, not only of the appellant's contract, but of all the contracts of sub-sale. On this footing they held that the time limited by the notice of January 30 was not a reasonable time, having regard to all that remained to be done, and that the respondents could have obtained specific performance notwithstanding such notice.

My Lords, I am unable to accept this view of the facts. There appears to me to be no evidence at all that the appellant could not have completed the purchase without the assistance of a loan of 14,000*l.* from Trinity House. Even if he had not the whole purchase-money in cash it might have been perfectly possible for him to obtain a temporary advance from his bankers pending the completion of the mortgage to Trinity House, a course which is common enough under similar circumstances, or it might have been possible for Trinity House to obtain the money for the advance from their bankers pending the payment off of the 12,000*l.* mortgage. It is true that there is no evidence on these points, but that does not seem to me to be the fault of the appellant. The point was raised for the first time at the trial. The respondents' defence is framed on the footing that the only completion contemplated by the parties was completion of the appellant's contract. There is not a word about the other

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sub-sales. The plea is that within the time limited by the notice of January 30 it was impossible to procure the execution of the conveyance to the appellant, not that it was impossible to procure the execution of any other conveyance. Had the respondents really understood the appellant's letter of December 12 and the subsequent correspondence to mean what has been held by the Court of Appeal, it is in my opinion inconceivable that the point should not have been raised expressly in the pleadings.

With the greatest respect, therefore, I cannot accept the view of the facts taken by the Court of Appeal. Even were I able to do so, I doubt whether the order dismissing the action could have been upheld, specific performance being out of the question. I know of no precedent for restraining an action at law in aid of a forfeiture clause, and I cannot think that s. 25, sub-s. 7, of the Judicature Act, 1873, can have been intended to apply equitable principles for any such purpose.

My Lords, the judgment of Joyce J. should, in my opinion, be restored, with costs here and below.

Lord Parmoor. My Lords, the appellant, on June 8, 1911, entered into an agreement with the respondents to purchase certain property in Yorkshire for the sum of 20,200*l.*, and paid as deposit in respect thereof 2020*l.* The time for the completion of the purchase was October 11, 1911, but the purchase was not then completed, and on January 30, 1912, notice was given that the purchaser had been prepared to complete since October 11, and was still ready to do so, and that unless the purchase was completed on or before the 13th prox. the contract would be treated as abandoned, and the purchaser would insist on the return of his deposit, interest, damages, and costs. The purchase was not completed on or before the date fixed in the notice, and the appellant brought an action claiming that he was entitled to treat the said agreement of June 8, 1911, as at an end, and for payment of the deposit money and interest thereon, or alternatively an inquiry as to damages. On February 19 notice was given that the respondents had resold the property. No argument was based on the effect of this resale, and I desire to reserve my opinion as to what the effect,

if any, of such resale may be in an action to recover deposit money. On the hearing of the action before Joyce J., the learned judge held that the appellant was entitled to recover. This judgment was reversed in the Court of Appeal, and against this decision the appeal is brought to this House.

If a contract for the sale of land is such that specific performance may be decreed in spite of failure to complete at the date named in the contract, time is said not to be of the essence of the contract. It was admitted that the present contract came within this category. The appellant did not claim that the respondents on October 11 had committed default which would have entitled him to claim on that date repayment of the deposit. The question is whether the respondents committed default in the performance of their contract at a later date by failure to comply with the notice of January 30, 1912, and thereby became liable to repay the deposit. The answer to this question depends on whether the respondents had been guilty of delay when the notice was given, and whether the time fixed in the notice for completion was in itself reasonable.

Joyce J. accepted a passage from Sugden on Vendors (14th ed., p. 268) as correctly expressing the general law: "Where time is not made of the essence of a contract by the contract itself, although a day for performance is named, of course neither party can strictly make it so after the contract; but if either party is guilty of delay a distinct written notice by the other, that he shall consider the contract at an end if it be not completed within a reasonable time to be named, would be treated in equity as binding on the party to whom it is given; but a reasonable time must be allowed." The difficulty is not in the statement of the general law, but in its application to the facts of any particular case. In the present case it was not known to the appellant at the date of the contract that the respondents had no more than a contract to purchase, and that the documents required to complete the respondents' title as between themselves and the tenant for life, from whom they were purchasing, had not been prepared. If, therefore, the delay of which complaint is made was due, not to the various steps required to complete the purchase of the appellant, but in connection with the

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purchase by the respondents from their vendors, I should come to the conclusion that such delay was unnecessary and due to a cause outside the contract made with the appellant. I think the correspondence shows that the arrangements to be made between the respondents and the tenant for life from whom they were purchasing did cause the delay, and that but for this factor the purchase could have been completed by January 30, 1912. This position is hardly disputed, and the case made was that the appellant subsequently to his contract did become aware of these special circumstances, and that the subsequent steps to complete the purchase were carried out on the understanding that the additional time thereby made necessary would be allowed.

On the other hand, it was known to the respondents that it was of great importance to the appellant to complete the purchase on or before January 1, 1912, in order that the appellant might be in a position to enter upon the farm, and to plough, sow, cultivate, manure, and manage all the arable land, as he would be entitled to do as of right under the terms of the existing tenancy when the purchase was completed.

The parties must have contemplated that the purchase would be completed not later than January 1, 1912. In the absence of explanation, I think that any delay beyond this date was unreasonable, and that the appellant would be justified in giving the notice of January 30, 1912.

What is the explanation given by the respondents? It is that the appellant, after he became aware that his vendor had no complete title, acquiesced in the time for completion being extended to meet the consequent delay, and to enable the completion of a number of other sub-purchases from the vendor to be carried out at the same time.

Mr. Younger, in his argument, put this case in the way most favourable for the respondents. He said it was not necessary that there should be a contract to this effect or an estoppel, but that it was sufficient to prove an understanding, and that if such an understanding was proved there was no ground to charge delay against the respondents. Whether there was such an understanding must depend on the evidence, but I can find no such understanding, and certainly neither contract nor estoppel.

On November 14, 1911, the solicitors of the appellant wrote that unless they received the supplementary abstract within seven days from the date thereof and a date for completion not later than three weeks, their instructions were to cancel the contract and apply for a return of the deposit. The answer to this letter attributes the delay to the completion of the title of the respondents, and throughout this position is not disputed by the respondents.

On December 1 Messrs. Wilson & Sons, who were not the solicitors to the respondents, wrote to the solicitors of the appellant: "We have numbered the draft in the order that we propose that completion shall take place, it being, of course, understood that all the conveyances of the different portions of the property shall be completed on the same day." There was no assent to this proposition, nor was it a proposition emanating from the respondents. On December 8 a similar suggestion came from the solicitors to the respondents, but it was dissented from in the strongest terms by a letter of December 12: "With regard to what you state as to completion, we beg to point out that it is now more than two months since the day fixed for completion, and that as it is most important for the appellant to be in a position to properly work the farm as and from the 1st of January, we must give you notice that unless you are in a position to complete this purchase on or before the 12th prox. our clients will have no course but to take proceedings against you for the return of the deposit." This letter is not consistent with the argument that at this date there was any understanding such as that on which the respondents rely.

This second notice was waived. There is a letter of January 18 from the solicitors of the appellant, expressing surprise at the delay, and adding "it is most serious to our client, having regard to the fact that he is purchasing, as stated prior to the signing of the contract, for the purpose of occupation."

The final notice was given on January 30, in the terms already quoted. I can find no letter in the correspondence altering the position taken up by the solicitors of the appellant in the letter of December 12. There is, however, a passage in the evidence on which the respondents rely. Mr. Stickney, the solicitor for

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the appellant, says in cross-examination that it was not a difficult title, and that the twenty-three completions on the same day was the difficulty, and that he knew that they were trying to have one transaction instead of two, and that he assented to this "in reason, within reasonable time." I cannot construe this answer as any admission on behalf of the appellant that his claim to have his contract of purchase completed within a reasonable time was waived or abandoned, and so to construe this passage would be at variance with the correspondence. In my opinion Mr. Stickney said no more than that he was willing to meet the respondents in their desire to have all the twenty-three completions on the same day, provided that this was done so that his own purchase was completed within a reasonable time.

It was further urged that the appellant had made arrangements with the Trinity House at Hull to advance to him a considerable portion of his purchase-money, and that this advance depended on the completion of some of the sub-purchases. The appellant, in his notice of January 30, had stated that he was ready to complete the purchase, and a vendor cannot claim to inquire into the sources from which a bona fide purchaser is preparing to find money for the completion of his purchase.

In my opinion the whole of this evidence is inadmissible except so far as it may be relevant to prove that there was an understanding that all the sub-purchases should be completed on the same day. On this issue the evidence has only a remote bearing, and there is no reason for inferring that the purchaser could not have found his purchase-money on temporary loan until the arrangement with the Trinity House, or some other permanent arrangement, could be carried through.

The second question is whether the notice gives a reasonable time in which to complete. The answer depends on the conditions which existed at the time when the notice was given, among them the extent of the delay and the causes which have brought it about. If on January 30, when the notice was given, the appellant had undertaken to wait for the completion of the other sub-purchases, then I should agree with the conclusions of the Court of Appeal, and Joyce J. clearly indicates that he would

have come to the same conclusion. But in my opinion the appellant had made no such agreement and there was no such understanding as suggested by Mr. Younger. On the question whether a sufficient time was allowed for the signing of the documents and for technical details, I am prepared to accept the great authority of Joyce J. and to agree in his finding that the notice in the circumstances was not unreasonable.

My Lords, in my opinion, the appellant succeeds, and the appeal should be allowed with costs in this House and the Court of Appeal.

Order of the Court of Appeal reversed and judgment of Joyce J. restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, December 11, 1914.

Solicitors for appellant: *Steavenson & Couldwell, for Stickney & Barton, Hull.*

Solicitors for respondents: *Walter Maskell & Nisbet, for Cranfield & Wheeler, St. Ives, Hunts.*

[HOUSE OF LORDS.]

H. L. (E.)* 1914 Oct. 21.

COMMISSIONERS OF INLAND REVENUE . APPELLANTS;

AND

SOUTHEND-ON-SEA ESTATES COMPANY, LIMITED . . . . . RESPONDENTS.

Revenue—Undeveloped Land Duty—Agricultural Land—Lease made before April 30, 1909—*Power to determine Tenancy—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 17, *sub-s.* 5.

By s. 17, sub-s. 5, of the Finance (1909-10) Act, 1910, where at the passing of the Act agricultural land is held under a tenancy originally created by a lease made before April 30, 1909, undeveloped land duty shall not be charged on the site value of the land during the original term of the lease while the tenancy continues thereunder. "Provided that where the landlord has power to determine the tenancy of the whole or any part of the land, the tenancy of the land or that part of the land shall not be deemed for the purposes of this provision to continue after the earliest date after the commencement of this Act at which it is possible to determine the tenancy under that power."

By a lease of December, 1906, agricultural land was demised from Michaelmas, 1904, for seven years, and the lease reserved to the lessors full liberty for them to resume possession "for building or other purposes" of certain parts of the land. The Crown claimed from the lessors undeveloped land duty for the years 1910-11 and 1911-12 on the land to which the reservation applied on the ground that they had power to determine the tenancy within the proviso to s. 17, sub-s. 5. It was admitted that the lessors had not wanted any part of the land for building or other purposes within the lease:—

Held, that in the absence of a bona fide intention to use the land for the stipulated purposes the lessors had no power to determine the tenancy within the proviso, and that the land was therefore not liable to undeveloped land duty.

Decision of the Court of Appeal [1914] 1 K. B. 515 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of Scrutton J. which affirmed a decision of a referee upon an appeal heard by him under s. 33 of the Finance (1909-10) Act, 1910.

The appeal related to a claim made by the appellants against the respondents for undeveloped land duty for the years 1910-11

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

(1) [1914] 1 K. B. 515.

and 1911-12 on certain agricultural land owned by them in the parish of Southchurch, in the county of Essex, and let on lease for a term of seven years from September 29, 1904. By a lease dated December 4, 1906, the respondents (hereinafter called the lessors) leased to one William Bentall certain lands coloured respectively blue and pink on a plan annexed to the lease for a term of seven years from September 29, 1904. At the date of the grant of the lease and on April 30, 1909, all the land comprised in the lease was agricultural land.

The lease contained the following provision :—

"And also reserved to the lessors full liberty for them at any time and from time to time during the term to enter upon and resume possession for building or other purposes of any part or parts of the said land coloured blue on the plan (including a right of way over the Wick Chaseway where adjoining the land taken) on giving to the lessee one calendar month's notice in writing and (if and when land on the south side of Southchurch Road opposite the chaseway to the Wick shall be so taken) leaving for the lessee a cartway thereover to afford access to the land to the south thereof which may remain subject to this lease. The lessors allowing for all land taken for any of the purposes aforesaid an abatement from the rent at the rate of two pounds per acre."

The lease remained in force during the whole of the term.

The claim for undeveloped land duty was in respect of the land coloured blue, to which the reservation applied.

Provisional valuations were served on the lessors on February 2, 1912, and the site values shown thereupon had been agreed and were now fixed. Notices of assessment and notices to pay undeveloped land duty for the years 1910-11 and 1911-12 were served on the lessors on April 12, 1912, and attached to these notices were schedules showing the amount of duty claimed to be exigible.

The lessors appealed against the assessment upon the ground that the land was agricultural land held under a tenancy originally created by a lease made before April 30, 1909; that the tenancy continued thereunder, and that the lessors had no power to determine the tenancy of the whole or any part of the land. The question raised by the appeal was whether the lessors had power to determine the tenancy of the whole or any part of the

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land within the meaning of s. 17, sub-s. 5, of the Finance (1909-10) Act, 1910. (1)

At the hearing before the referee no evidence was called, it being admitted by the Commissioners that none of the land was required for building purposes before September 29, 1911. The referee held that the lessors had power to resume possession and were therefore liable to pay undeveloped land duty. The lessors appealed, and at the hearing before Scrutton J. the Attorney-General, on behalf of the Commissioners, admitted that the lessors did not before September 29, 1911, want or need the land in question or any part of it for building or any other purpose within the lease; that they had no intention of building and did not require the land, and had no intention of using it for any other purpose.

Scrutton J. affirmed the decision of the referee.

The lessors appealed to the Court of Appeal (Cozens-Hardy M.R., Swinfen Eady and Phillimore L.JJ.), who held that the lessors had no power to determine the lease as they had no bona fide intention to use the land, and that the land was consequently not liable to undeveloped land duty.

Sir John Simon, *A.-G.*, and *Sir Stanley Buckmaster*, *S.-G.* (with them *William Finlay*, *K.C.*), for the appellants. Undeveloped land duty is a duty imposed on undeveloped land and an owner avoids the duty by developing his land; but, inasmuch as some owners are not in a position to develop their land by reason of their having granted leases, the Act exempts such land from liability to duty, subject to the qualification that the exemption

(1) Finance (1909-10) Act, 1910, s. 17, sub-s. 5: "Where agricultural land is at the time of the passing of this Act held under a tenancy originally created by a lease or agreement made or entered into before the thirtieth day of April nineteen hundred and nine, undeveloped land duty shall not be charged on the site value of the land during the original term of that lease or agreement while the tenancy continues thereunder. Provided that where the landlord has power to determine the tenancy of the whole or any part of the land, the tenancy of the land or that part of the land shall not be deemed for the purposes of this provision to continue after the earliest date after the commencement of this Act at which it is possible to determine the tenancy under that power."

is not to apply if the lessor, in spite of the lease, is in a position to develop the land. The whole question therefore is, was it possible for the lessors to determine this tenancy? It is no answer to say that the lessors did not want to develop the land. The question is not whether they wished to determine the tenancy, but whether they were able to determine it if they chose. If a lessor has power to determine the tenancy for a particular purpose and that purpose is dependent on his own volition he has power to determine it within the meaning of s. 17 of the Act.

J. A. Hawke, K.C., and *W. Allen*, for the respondents, were not called upon.

EARL LOREBURN. My Lords, I do not think it is necessary to trouble the learned counsel for the respondents, because in my opinion the decision of the Court of Appeal was perfectly sound. Undeveloped land duty is claimed by the Attorney-General. It is not payable on land which was under a lease made before the Act, but there is a proviso that exemption is not to arise where the landlord has power to determine the tenancy. Now here the lease enables the landlord to resume possession for building or other purposes, which means in my opinion purposes of the same kind. It is admitted that the landlord had no such purpose. Under these circumstances, had the landlord in this case the power to determine the tenancy? I think he had not. This power only arose when there was a purpose. If in an action between him and the tenant the landlord had said, "I wish very much to determine but I have no purpose within the covenant," he had not power to determine the lease. At the end of the proviso there are words to the effect that the tenancy shall not be deemed to continue after the earliest date after the commencement of this Act at which it is possible to determine the tenancy under that power. I do not think it is possible to determine the tenancy unless circumstances exist which would enable the landlord to support his determination in a Court of law.

The Solicitor-General has argued that the landlord had the power because if he resolved upon the purpose he then would possess the power and it would be in his power to resolve the purpose. I do not agree with that. The statute says he shall

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have power to determine; and if the landlord has not the purpose he has not power to determine, even though he may have the power to form the purpose.

LORD ATKINSON. My Lords, I concur. I think the judgment of the Court of Appeal was sound and the reasoning on which the learned Lords Justices based their respective judgments quite convincing.

LORD PARKER OF WADDINGTON. My Lords, I agree. I will only add this, that I think, on perusing the section, it is reasonably clear that in order to bring the case within the proviso there must be a power to determine the lease which is immediately exercisable, although of course the section itself contemplates that the operation of the power may be only to determine the lease at a future date, because it alludes to the earliest date at which it is possible to determine it under the power. If that be the case, not only must the power be immediately exercisable, but in the present case, in order to bring that about, there must exist a certain state of circumstances, and that state of circumstances must be that there must be a bona fide intention on the part of the landlord to use the land for certain definite purposes. It is admitted that there was no such intention, and, therefore, though there may be a power in the sense that the Solicitor-General has mentioned, there is no power immediately exercisable, and therefore the case is not within the proviso.

LORD SUMNER. My Lords, I agree.

LORD PARMOOR. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, October 21, 1914.

Solicitor for appellants: *Hugh Bertram Cox, Solicitor of Inland Revenue.*

Solicitors for respondents: *Dennes, Lamb & Pearce Gould, fo Dennes, Lamb & Drysdale, Southend-on-Sea.*

[HOUSE OF LORDS.]

USHER'S WILTSHIRE BREWERY, LIMITED . APPELLANTS; AND BRUCE . . . . . RESPONDENT.

H. L. (E.)* 1914 Dec. 4.

Revenue—Income Tax—Sched. D—Balance of Profits and Gains—Deductions—Brewery Business—Tied Houses—Repairs—Loss on Rents—Insurance Premiums—Legal Expenses—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2.

Where money is paid by a landlord, being a brewer, or allowed by him to the tenant of a tied house, as a necessary incident of the profitable working of the brewery business, the landlord is not prevented from deducting that money, in his estimate of the balance of profits of his brewery business for the purposes of assessment to income tax, by reason of the fact that it enures also for the benefit of the tenant's separate trade in the tied house.

So *held* on the authority of *Smith* v. *Lion Brewery Co.* [1911] A. C. 150.

A brewery company, as a necessary incident of the profitable working of their brewery business, acquired and owned licensed houses which they let to tied tenants, who, in consideration of the tie, paid a rent less than the full annual value. The tenants were under an agreement to repair and to pay rates and taxes, but the company in fact did the repairs and paid the rates and taxes in order to avoid loss of tenants. The company also in respect of these houses paid premiums on insurances against fire and loss of licences and incurred legal expenses in connection with the renewal of the licences and otherwise. All these sums were solely and exclusively expended or allowed by the brewery company for the purposes of their business:—

Held that, in estimating the balance of the profits of their business for the purposes of assessment to income tax, the brewery company were entitled to deduct all these sums as expenses necessarily incurred for the purpose of earning the profits.

Brickwood & Co. v. *Reynolds* [1898] 1 Q. B. 95 overruled.

Decision of the Court of Appeal [1914] 2 K. B. 891 reversed.

APPEAL from a decision of the Court of Appeal (1) varying a decision of Horridge J. (2) upon a case stated by the Commissioners for General Purposes of the Income Tax Acts for the Tax Division of Trowbridge.

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

(1) [1914] 2 K. B. 891. (2) [1914] 1 K. B. 357.

H. L. (E.) 1914 — USHER'S WILTSHIRE BREWERY, LIMITED v. BRUCE.

A supplemental statement of facts agreed between the parties was by order of Horridge J. taken to be part of the case, and appears below as par. 8A.

The appellants, a limited company carrying on business as brewers and maltsters and sellers of beer, wines and spirits at Trowbridge and elsewhere, appealed to the Commissioners against an assessment of 17,338*l.* (less 401*l.* allowance for wear and tear of plant) made on them under 16 & 17 Vict. c. 34, s. 2, Sched. D, in respect of the profits of their trade. The appellants claimed to have this assessment reduced by the following amounts :—

	£	s.	d.
(A) Repairs to tied houses . . .	1004	0	10
(B) Difference between rents of leasehold houses or Sched. A assessment of freehold houses on the one hand, and rents received from tied tenants on the other hand . .	2134	14	6
(C) Fire and licence insurance premiums	90	7	6
(D) Rates and taxes	38	7	6
(Claim (E) was waived.)			
(F) Legal and other costs . . .	56	7	0

The material paragraphs of the case were as follows :—

"3. In common with other brewery companies the appellants have from time to time in order to increase their trade purchased licensed houses which they let to tenants, one of the terms of such lettings being that the tenants should buy from the appellants all the ale, beer, wines and spirits sold in such tied houses.

"4. The profits of the appellants are made by brewing ale, beer and other articles and purchasing spirits in bulk and selling these commodities partly to private individuals, partly (to a limited degree) to free licensed houses, and as to the greater part to the tenants of their tied houses. All these profits of the appellants are included in the assessment. Such profits are materially increased owing to the possession by them of the tied houses in question and in consequence of an increased sale of these commodities to the tenants of those tied houses and to the fact that they are able to obtain and do obtain for the same

class of goods a higher price from the tenants of their tied houses than they can obtain or are able to obtain from their other customers.

"5. The tenants of the appellants' tied houses do not, as a matter of fact, spend any money on repairs to the tied houses let to them. Such repairs as from time to time become necessary to these tied houses are executed by the appellants and it is not disputed that the sum of 1004*l.* 0*s.* 10*d.* is not an excessive sum to be expended in such repairs, including compliance with the requirements of the licensing authorities.

"6. The tied houses in question are occupied by the tenants partly for the purposes of their trade as licensed victuallers and beer retailers, and partly as the private dwellings of themselves and their families. Repairs are executed indifferently to the trade and private dwelling parts of these houses.

"7. The said premises have been acquired by the appellants and are held by them solely in the course of and for the purpose of their said business and as a necessary incident to the more profitably carrying on of their said business. The possession and employment of the said premises as aforesaid are necessary to enable them to earn the profits upon which they pay income tax, and without the said premises and their use as aforesaid the appellants' profits if there were any at all would be less in amount.

"Except for the purposes of and employment in their said business the appellants would not possess the said premises.

"The said premises were not acquired and are not held by the appellants as investments and if any house loses its licence the appellants as soon as possible get rid of it.

"8. The repairs to the said premises (in respect of which a deduction was claimed by the appellants) were solely repairs which the appellants were bound to do in order to maintain the said premises in a condition fit to use as licensed premises.

"8a. The following further facts as to the said expenses and losses A—F are agreed."

Under head A the tenancy agreement which was used in the case of all the tied houses in question was exhibited. It contained the usual provisions compelling the tenant to

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buy liquors from the appellants only, to pay rates and taxes, and to repair and keep in good tenantable condition the interior of the premises. The supplemental statement under this head then proceeded as follows:—

"In respect of the houses for which these claims arise the appellants have in fact borne the cost of the repairs themselves. They have done so because although the legal obligation to repair is on the tenants it is found that it is in the interests of the appellants commercially to pay for these repairs rather than to enforce the legal obligation resting on the tenants. The cost is incurred not as a matter of charity but of commercial expediency and is necessary in order to avoid the loss of tenants and consequent transfers to which the licensing justices object. Some of these repairs are to the exterior of the premises. Clause 8 of the case applies to all these repairs.

"B. In consideration of the 'tie' contained in the tenancy agreement the appellants let the tied houses at considerably less than their annual value or what they could get for them without such a tie and in the case of houses rented by them also below what they pay for the rent thereof themselves. Such letting is made by them deliberately and solely in order to get the trade which the using of such houses as tied houses affords and by means of so doing they are enabled to make a profit on their total trading transactions by reason of the increased sale of their beer and other goods. The letting at less than the annual value or head rent is not due to a change in the value of the premises. The figures in question represent the difference between the rents received by the appellants on the one hand and

"(i.) In the case of their freehold houses the net Schedule A assessments;

"(ii.) In the case of their leasehold houses the rents paid by them.

"If it should be held that in case (ii.) the net Schedule A assessment is the proper figure it can be ascertained.

"C. These are annual expenses incurred by the appellants on the said tied houses in the one case to insure against destruction of or injury to the premises, i.e., the fabric, by fire, in the other to insure against loss of the publican's or beer house licence (as

the case may be) in cases where no compensation is payable out of the compensation fund. The payment of premiums for the insurance of trade premises is a usual and proper trade outgoing and is made by the appellants as such.

"D. These expenses were paid by the appellants in respect of some of the said tied houses. In respect of the houses for which this claim arises the appellants did not for the reasons stated under A (supra) enforce the tenants' covenant to pay and consequently paid the rates and taxes themselves."

Head F gave the details of the legal costs and expenses paid by the appellants in respect of the tied houses. These consisted of solicitors' costs and disbursements in respect of the renewal of publicans' licences, surrenders, terminations and assignments of leases or tenancy agreements, the assessments of tied houses, obtaining a full licence, complaints against tenants, and advising as to thefts of beer.

"9. In addition to their tied houses the appellants own other licensed houses which they have during the year occupied by their managers or servants, and in respect of these, and of the brewery and other premises occupied by the appellants for the purpose of their trade, they have been allowed for repairs before the assessment was made the allowance to which they are entitled under 5 & 6 Vict. c. 35, s. 100, First Case, rule 3.

"10. It was contended on behalf of the appellants:—

"(A) That having regard to the decision in *Smith* v. *Lion Brewery Co.* (1) the deductions claimed ought to be allowed.

"(B) That the licensed premises of which they are the owners and lessees have been acquired by them and were held by them in the course of and for the purpose of their said business and as a necessary incident to the more profitable carrying on of such business and that the purchase and letting of licensed houses was an essential part of their business as brewers.

"(C) That in consideration of the tenants of their tied houses covenanting to buy all ales, beer, wines and spirits from the appellants only, those tenants pay a much less rent than the full annual value of the premises.

"(D) That by these means and the possession and use of the

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said premises which are employed by the brewery company as substantially necessary to carry on their business profitably the appellants are enabled to earn and do earn profits upon which they pay income tax, and which without the said premises and their user for the purposes aforesaid would be less in amount. That the appellants had not acquired the premises as investments or for the purposes of investment.

"(E) That the repairs in question were a necessary outlay without which such profits could not have been earned and that these form a legitimate deduction in arriving at the total gains in respect of which they are assessed under Schedule D.

"(F) That they are properly entitled to a deduction from their profits by their assessment under Schedule D in respect of the difference between the rents of leasehold houses or Schedule A assessment of freehold houses on the one hand and rents received from their tenants of tied houses on the other hand.

"(G) That they are entitled to the above-named deductions for fire and licence insurance premiums, for rates and taxes . . . . and for legal and other costs as necessary expenses in the conduct of their business, without which their profits as assessed under Schedule D could not be earned.

"11. The surveyor of taxes on the other hand contended:—

"(A) That the trade of the brewery is quite distinct from the trade of the public-house and that the expenses incurred in respect to the public-house cannot be deducted from the profits of the brewery, and that so far as the deduction for repairs was concerned the Commissioners were bound by the judicial decision contained in the case of *Brickwood & Co.* v. *Reynolds* (1) decided in the Court of Appeal on the 17th day of November, 1897.

"(B) That there was no authority for the deductions (B), (C), (D), and (F), claimed by the appellants as set forth above, on the ground that the decision as to repairs to tied houses covers these deductions by analogy.

"(C) That in estimating the balance of the profits and gains these sums should not be set against or deducted from such profits and gains, being money wholly and exclusively laid out or expended for the purpose of such trade, and that with regard

(1) [1898] 1 Q. B. 95.

to the deductions sought under these heads also it is necessary to differentiate between the trade of the brewery and the trade of the public-house, and finally that these deductions are not authorized by the third rule of the First Case, s. 100, Income Tax Act, 1842."

The Commissioners decided that the appellants were not entitled to any of the deductions claimed.

On appeal from that decision Horridge J. held (1.), following *Brickwood & Co.* v. *Reynolds* (1), that the deduction in respect of the repairs to the tied houses could not be allowed; and (2.) that the deductions in respect of all the other items must be allowed as expenses necessarily incurred for the purpose of earning the profits, and wholly and exclusively for the purposes of the trade.

From the first part of that decision the appellants appealed; and there was a cross-appeal by the respondent against the latter part of the decision.

The Court of Appeal (Cozens-Hardy M.R., the President of the Probate, Divorce and Admiralty Division, and Joyce J.) dismissed the appellants' appeal and allowed the respondent's appeal, and held that all the deductions claimed were inadmissible.

1914. Oct. 27, 29, 30. *Sir Robert Finlay, K.C.*, and *Ryde, K.C.* (with them *A. M. Latter*), for the appellants. Income tax in respect of any trade is chargeable "on the balance of the profits or gains": Income Tax Act, s. 100, Sched. D, First Case, rule 1; but to arrive at such balance it is essential that the expenses of earning the profits should be taken out of the gross receipts: *Russell* v. *Town and County Bank* (2); *Gresham Life Assurance Society* v. *Styles* (3); *General Hydraulic Power Co.* v. *Hancock.* (4) All the disbursements and expenses claimed to be deducted by the appellants were "money wholly or exclusively laid out or expended for the purposes of" the appellants' "trade" within rule 1 of the rules applying to the First and Second Cases under Sched. D. That is the effect of the findings

(1) [1898] 1 Q. B. 95.
(2) (1888) 13 App. Cas. 418, at pp. 424, 429.
(3) [1892] A. C. 309, at pp. 316, 321.
(4) [1914] 2 K. B. 21, at p. 28.

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of the Commissioners. What is to be included in expenses necessary to earn the profits is a question of fact for the Commissioners, and their findings are conclusive provided there is any evidence to support them : *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (1) ; *Smith* v. *Lion Brewery Co.* (2) The decision of the House of Lords in the latter case proceeds on the principle that expenses necessarily incurred in earning the profits must be deducted in order to ascertain the balance of profits, and it is indistinguishable in principle from the present case. In that case the payment was made in obedience to a statutory necessity ; here it is made in obedience to a business necessity. *Guest, Keen & Nettlefolds* v. *Fowler* (3) and *Moore* v. *Stewarts & Lloyds* (4) are illustrations of this general principle. As regards the repairs to the tied houses, the Court of Appeal thought that the question was concluded by *Brickwood & Co.* v. *Reynolds* (5) ; but, first, that case is distinguishable because there were no findings about the course of business such as exist here, and in *Smith* v. *Lion Brewery Co.* (6) in the Court of Appeal it was distinguished by Farwell L.J. on that ground ; and, secondly, it is wrong in law. A. L. Smith L.J. read rule 3 of the First Case as meaning that no deduction should be allowed in respect of repairs unless the premises were occupied by the person assessed for the purposes of his trade, and then only on the three year basis. That is a complete misreading of the rule. Under Sched. A the owner of a house is entitled to a remission of one-sixth in respect of repairs : Finance Act, 1894, s. 35 ; but where the cost of the repairs is a necessary expense in earning the profits of his trade the owner is none the less entitled to deduct the whole cost of the repairs under Sched. D. The deduction granted under Sched. A to the brewer as owner cannot affect the business carried on under Sched. D. The fact that the appellants may get a double deduction in respect of repairs is immaterial, because the repairs relate to two different matters. The two things are not in pari materia and are incommensurate.

(1) [1914] 3 K. B. 674, at pp. 682-4.
(2) [1911] A. C. 150, at pp. 156, 158.
(3) [1910] 1 K. B. 713.
(4) (1906) 8 F. 1129.
(5) [1898] 1 Q. B. 95.
(6) [1909] 2 K. B. 912, at p. 922.

In considering an assessment under Sched. D the cost of repairs is not a deduction, but is something which is to be taken out of the gross receipts before arriving at the balance of profits. As regards the loss of rent due to the letting of tied houses to publicans at less than the rack rent in consideration of the tie, Channell J. in *Smith* v. *Lion Brewery Co.* (1) puts the very question raised by this case, and suggests that such loss ought to be deducted as an expense of the trade of the brewery in estimating the profits and gains of that trade. The letting at the reduced rent is solely for the purpose of getting the benefit of the tie. [They also referred to *Turner* v. *Carlton* (2) with regard to insurance premiums.]

Sir John Simon, *A.-G.*, and *William Finlay*, *K.C.* (with them *Sir Stanley Buckmaster*, *S.-G.*), for the respondent. The case for the Crown depends in part upon the proposition that though the Act of 1842 provides a series of schedules, those different schedules do not constitute different taxes; the income tax is one tax: *London County Council* v. *Attorney-General.* (3) The principle of the Act is to tax certain kinds of property under Sched. A and certain other kinds of property under Sched. D, and the two things do not mix. To accede to the argument of the appellants would be to upset the scheme of the Act. As regards the loss of rent, the only right to deduct is in respect of premises which are occupied by the person assessed. If a trader occupies premises for the purposes of his trade he is entitled to deduct the rent or annual value, but that right of deduction does not extend to premises acquired by the trader for other persons to occupy. Upon the true construction of rule 1 of the rules applicable to the First and Second Cases under Sched. D, it cannot be said that a brewer uses for his trade purposes premises which are occupied by a publican; otherwise there would be a deduction by the publican who occupies and by the brewer who does not. The construction contended for by the Crown is assisted by rule 2 of Scheds. A and B, No. IX., which for the purposes of the Act identifies the occupier with the person who has the use of the premises. In this Act "use" and "occupation" are convertible

(1) [1909] 1 K. B. 711, at p. 715. (2) [1909] 1 K. B. 932.
(3) [1901] A. C. 26, at p. 35.

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terms. The Act does not contemplate that there may be two separate and independent persons both using the same premises at the same time for the purposes of their businesses. If the brewers put in a manager they would be entitled to deduct the rent or annual value, but here it is the publican who is entitled to deduct, the trades of the brewery and the public-house being two distinct things: *Watney* v. *Musgrave.*(1) *Russell* v. *Town and County Bank* (2) says nothing to the contrary of this. As regards the repairs, the special provision of rule 3 of the First Case, Sched. D, negatives any right of deduction under the general words of the Act. That rule authorizes a deduction for repairs in respect of premises occupied by the person assessed and used for the purposes of his trade, but then only on the three year average, and it forbids any further deduction; and inasmuch as the premises here in question do not satisfy those conditions, no deduction for repairs can be made in respect of them. Upon the appellants' contention, to the extent of one-sixth of the rent they are getting a double deduction, but in *Brickwood & Co.* v. *Reynolds* (3), which was also a brewers' appeal against an assessment to income tax, Lawson Walton, K.C., for the appellants, expressly disclaimed any such right. *Brickwood & Co.* v. *Reynolds* (3) was rightly decided and is not inconsistent with *Smith* v. *Lion Brewery Co.*(4) In the latter case the only point decided by the House was that the payment by the landlord of his share of a statutory contribution, which was distributed between the landlord and the tenant, was a disbursement which he was entitled to deduct as having been incurred in his business as a brewer. That case therefore does not apply. Then it is said that this is not a deduction at all, but that argument is answered by Rigby L.J. in *Brickwood & Co.* v. *Reynolds.*(3) The Lord Justice also points out the very serious consequences which would result from the appellants' contention. Further, there is no finding by the Commissioners that these expenses have been incurred solely and exclusively for the purposes of the appellants' trade; and their findings as to the motives of the appellants in incurring these expenses are immaterial.

(1) (1880) 5 Ex. D. 241, at p. 246.
(2) 13 App. Cas. 418.
(3) [1898] 1 Q. B. 95.
(4) [1911] A. C. 150.

[They also referred to *Coltness Iron Co.* v. *Black* (1) and *Strong & Co.* v. *Woodifield.* (2)]

Sir Robert Finlay, K.C., replied.

The House took time for consideration.

Dec. 4. EARL LOREBURN. My Lords, this case relates to a claim for deductions on an assessment for income tax under Sched. D.

The appellants, a brewery company, were assessed on upwards of 17,000*l.*, profits of their trade. Their business consisted of brewing and selling beer and other articles, and purchasing spirits in bulk and selling it, principally to the tenants of their tied houses, but also to other people. They claimed to have the assessment reduced by several sums, all of them expended in respect of the tied houses. It is found, with some redundancy of expression, that all these sums of money were properly expended for the purpose of keeping the tied houses in a condition to earn a profit by selling the goods which the brewery company supplied to them, and that the possession of these tied houses is a necessary incident of the carrying on by that company of the brewery business so as to earn the profits upon which it is charged with income tax.

Accordingly the main question for decision is this. When the owners of a brewery business, who are also landlords of tied houses which sell their commodities by retail, come to be assessed for income tax under Sched. D, can they, in estimating the balance of profits and gains on the brewery business, bring into account expenses which they have properly though voluntarily incurred in supporting their tenants so as to enable them to sell the goods supplied by the brewery company? In all instances the sums here sought to be brought into account are voluntarily given to or paid for the tenants simply in order that the tied houses may be able to sell more of their landlord's liquor. If their leases alone were considered, the tenants are bound to pay some of these moneys themselves.

(1) (1881) 1 Tax. Cas. 287, at p. 307; affirmed ibid. 311; 6 App. Cas. 315.
(2) [1906] A. C. 448.

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In my opinion this point was practically decided by the *Lion Brewery Co.'s Case.* (1) I did not myself agree with that decision, and your Lordships' House was equally divided, but it is none the less binding, and our duty is loyally to carry it into effect. The brewers were there allowed in estimating their balance of profit and loss under rule 1 to enter upon the debit side an allowance which they had to make for their share of the compensation charge in respect of their tied houses. That compensation levy became payable by them because they were landlords of the tied houses and because it was necessary for the levy to be paid in order to save the licences which were in the name of their tenants. It was held to be a proper debit in estimating the balance of profits of the brewery business, because it was paid to keep going another business the success of which was essential to their own. That was the principle of the decision, and not the narrow point that the compensation was payable by statute. Whether the necessity to pay arises by statute or from business considerations seems to me immaterial, in view of that decision.

The reasons given were that profits and gains must be estimated on ordinary principles of commercial trading by setting against the income earned the cost of earning it, subject to the limitations prescribed by the Act. One of these limitations is found in rule 1 of "Rules applying to both the preceding cases." It says that in estimating the balance of the profits or gains "no sum shall be set against or deducted from, or allowed to be set against or deducted from such profits or gains, for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade." Now, it was argued in the *Lion Brewery Co.'s Case* (1) that the landlord's share of the compensation charge was at all events partially expended for the purposes of the tied house trade, which belonged to the tenant, not to the landlord. But the decision was against this view. It is therefore settled, in my opinion, that when the money is paid by the landlord, being a brewer, or allowed by him to the tenant of a tied house as a necessary incident of the profitable working of the brewery business, the landlord is not prevented from deducting that money in his estimate of the

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balance of his own profits by reason of the fact that it enures also to the benefit of the tenant's separate trade in the tied house. I am always averse to reasoning by analogy from the facts of one case to the facts of another case; but I cannot see that the decision in the *Lion Brewery Co.'s Case* (1) rests upon anything short of what I have stated. Upon the facts as found it is impossible to distinguish the rule laid down there. If it is to be changed the Legislature must change it; we cannot.

Now to apply that to the particular deductions claimed on this appeal.

There is a claim for 1004*l.* 0*s.* 10*d.* for repairs to tied houses. These repairs ought, under the leases, to have been executed by the tenants of the tied houses. In fact they were executed by the landlord, because it is found that it is in the interests of the landlord commercially to pay for these repairs rather than enforce the legal obligation. The cost is incurred not as a matter of charity but of commercial expediency, and is necessary in order to avoid the loss of tenants, and consequent transfers, to which the licensing justices object. In rule 3 of the First Case there is a statutory direction: "In estimating the balance of profits and gains chargeable under Schedule (D.)" no deduction is to be allowed "for repairs of premises occupied for the purpose of such trade . . . . beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made." This means, I think, that when a man occupies premises for the purpose of his trade he is not to make any deduction beyond the three years' average for repairs of the premises he so occupies. He is estimating the balance of profits of his own trade and deducting the repairs of premises which he occupies for the purpose of that trade. In this case he does not occupy the tied houses at all, and he is not estimating the balance of profits of the tied house trade. Therefore the rule cited does not apply, and the repairs in question do not fall within the rule. The cost of them can be deducted by the brewery company as part of the cost of earning their own profits, being admittedly reasonable in amount.

The next item which the brewery company seeks to deduct is

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2134*l.* 14*s.* 6*d.*, which is the difference between the annual value or the rents which they pay to the freeholders of the tied houses on the one hand and the rents which they receive for the same houses from their tied tenants on the other hand. This difference arises because the tied tenants are bound by covenant to buy their liquor solely from the brewery company. In consideration of this "tie" the tenants occupy at rents less than the annual value and less than the rents which the brewery company itself has to pay for the houses, and the sum claimed to be deducted must be taken to represent in each case the difference between the rents actually received from the tied tenants and the proper annual value. For no argument was offered to show that the rent paid by the brewery company is other than the proper annual value. And it is agreed that this letting at reduced rents is made solely to get the trade which the using of the tied houses affords, and so to swell the profits of the brewery business. On ordinary principles of commercial trading such loss arising from letting tied houses at reduced rents is obviously a sound commercial outlay. Therefore this item must be deducted.

Very little was said in argument about the remaining items which the appellants seek to deduct, and nothing was said as to the correctness of the figures if on principle such deductions could be made. I think all of them can be supported upon the same grounds as repairs and loss of rental except one, which was given up.

My Lords, I am not blind to the fact, upon which the Attorney-General dwelt, that the view I am obliged to take of this case may cut deep into the revenue, not merely from brewery profits but also from other trades which have ancillary trades connected with or supported by them. I do not propose to offer illustrations. That, however, cannot influence your Lordships in giving effect to earlier decisions of this House.

I think, therefore, that this appeal succeeds.

LORD ATKINSON. My Lords, this is an appeal from a judgment of the Court of Appeal, dated April 3, 1914, disallowing the appeal of the appellants and allowing the appeal of the respondent from a judgment, dated December 12, 1913, of Horridge J.

pronounced on a case stated under s. 59 of the Taxes Management Act, 1880, by the Commissioners for General Purposes of the Income Tax Acts of the Tax Division of Trowbridge, in the county of Wilts.

Horridge J., on the hearing before him, considered that the case as stated did not set forth with sufficient fulness information on certain points, and accordingly ordered that unless the parties, before a certain date, agreed to a supplemental statement of the facts the case should go back to the Commissioners for a further statement. The parties did, before the date named, agree to a supplemental statement, which was for all purposes treated as part of the case stated.

The question for decision on this appeal is whether the appellants, who are brewers, are, for the purpose of arriving at the balance of the profits and gains of their trade, assessable to income tax under Sched. D, Case 1, of the Income Tax Acts, entitled to deduct the four sums following, or any and which of them, in respect of the several matters set forth:—

	£	s.	d.
(A) Repairs to tied houses . . .	1004	0	10
(B) Difference between rents of leasehold houses or Sched. A assessment of freehold houses on the one hand, and rents received from tied tenants on the other hand	2134	14	6
(C) Fire and licence insurance premiums	90	7	6
(F) Legal and other costs . . .	56	7	0

The Commissioners were of opinion that the appellants were not entitled to deduct any of these sums. Horridge J. concurred in opinion with the Commissioners as to the sum claimed for repairs, considering himself bound by the decision of the Court of Appeal in *Brickwood & Co.* v. *Reynolds* (1); but held that the other sums claimed should, on the authority of *Smith* v. *Lion Brewery Co.* (2), be deducted.

The Court of Appeal concurred in opinion with Horridge J. as to the item for repairs, held that he was in error in supposing that the case of *Smith* v. *Lion Brewery Co.* (2) applied

(1) [1898] 1 Q. B. 95. (2) [1911] A. C. 150.

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to any of the items, and decided that all the deductions were inadmissible.

Before proceeding further it might be well, as there was in this latter case an equal division of opinion in your Lordships' House, to point out that it was laid down by Lord Campbell in the case of *Beamish* v. *Beamish* (1), that the decision of this House occasioned by the Lords being equally divided is as binding on the House and on all inferior Courts as if it had been pronounced nemine dissentiente. In *Attorney-General* v. *Dean and Canons of Windsor* (2) Lord Campbell said: "But the doctrine on which the judgment of the House is founded, must be universally taken for law, and can only be altered by Act of Parliament. So it is, even when the House gives judgment in conformity to its rule of procedure, that where there is an equality of votes, semper praesumitur pro negante." He then proceeds to enforce this point by reference to the case of *Reg.* v. *Millis*. (3)

One must look, therefore, for the ratio decidendi, the doctrine on which the judgment of the House was founded, to the judgments of those members of the House who voted in the negative, on the question put, "that the judgment appealed from be reversed." Stated broadly, I think that doctrine amounts to this, that where a trader bona fide creates in himself, or acquires a particular estate or interest in premises, wholly and exclusively for the purpose of using that interest to secure a better market for the commodities which in his trade he vends, the money devoted by him to discharge a liability imposed by statute on that estate or interest, or upon him as the owner of it, should be taken to have been expended by him wholly and exclusively for the purposes of his trade.

I use the word "creates" advisedly, in order to meet the case of a trader who lets premises he has, for instance, inherited to a tenant who covenants to vend his goods exclusively in them.

The trader in such a case by the letting creates in himself the estate or interest of a lessor wholly and entirely for the purposes of his trade, namely, to provide a better market for his goods.

(1) (1861) 9 H. L. C. 274, at p. 338.

(2) (1860) 8 H. L. C. 369, at p. 392.

(3) (1844) 10 Cl. & F. 534.

No doubt, in the case above mentioned the liability imposed on the landlord, or on his interest, was imposed by statute, but, speaking for myself, I am bound to say that I cannot see any difference in principle between a liability imposed on such a lessor by statute, and a liability imposed upon him by the reasonable requirements of his trade. I think the money devoted to discharge the liability should in each case be held to be money expended wholly and exclusively for the purposes of the landlord's trade, these being the very purposes for which the interest was created. I take this opportunity of pointing out that at p. 163, line 22, of the report of the case of *Smith* v. *Lion Brewery Co.* (1) the words "unconnected with the brewer's trade" should, in order to make my meaning clearer, be inserted after the word "tenants."

It has been contended on the part of the Crown that the findings of fact in this case do not amount together to a finding that the sums claimed to be deducted were laid out or expended wholly and exclusively for the purposes of the appellants' trade on the profits and gains of which they are assessed.

It is quite true that the Commissioners have not framed any of their findings in the precise words of rule 1, Sched. D, applying both to professions and trades. They do not in so many words find that the several sums which the appellants claim to deduct were disbursements wholly and exclusively expended for the purposes of the appellants' trade. That fact, however, by no means disposes of the question. In pars. 4, 5, 7, and 8 of the case stated, and also in the supplementary statement, the facts which they have found are set forth.

It is for a Court of law to construe these several paragraphs as written documents, just as the Courts of law often have to construe the answers (in writing) of juries to questions put to them by the judge presiding at a trial, or as such Courts have to construe a correspondence between parties litigant to determine whether their letters in the aggregate contain a concluded contract in writing.

In doing this the tribunal of law does not usurp the jurisdiction of the tribunal of fact, and from facts found by the latter draw a

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further inference of fact. It merely discharges its proper and exclusive function of construing written documents. What, then, do those paragraphs disclose?

Par. 4 sets forth that the appellants obtain higher prices for their beer and increase the profits of their trade by the ownership and letting of their tied houses.

Par. 5, that such repairs of those tied houses as are claimed for are necessary, and are effected at the appellants' expense. It is not suggested that the sum claimed, 1004*l.* 0*s.* 10*d.*, is excessive having regard to the requirements of the licensing authorities.

Par. 7, that these houses are not acquired by the appellants as investments; that if any house lost its licence the appellants would get rid of it; that except for the purpose of employing these houses in their business the appellants would not possess them at all; that they have acquired and hold them solely in the course of and for the purposes of that business, and as a necessary incident to the carrying it on, and that the possession and employment of the houses in the manner described is necessary to enable the appellants to earn the profits which it is sought to tax; and, further, that without these houses, used in the manner described, the profits, if any, of the appellants' trade would be much less in amount.

The meaning of all these written statements when condensed appears to me to be simply this, that the appellants acquired and let these houses in the manner described for the purposes of their trade, and for no other purpose whatever, which is precisely the same as saying they acquired and let them solely and exclusively for the purposes of their trade, that they are necessary for those purposes, and that by means of their acquisition and use in the manner indicated the profits on which the appellants are to be taxed are earned.

Then par. 8 sets forth that the repairs claimed for are solely repairs which the appellants are bound (i.e., obliged) to make in order to maintain the premises in a condition fit for their use as licensed premises.

Now the supplemental statement of the facts in par. A sets forth that though the tenants are under their agreements bound to make the necessary repairs, the appellants, in fact,

execute them at their own expense, because it is found to be to their interest commercially so to do rather than to enforce the obligations of their tenants; that the cost of the repairs is incurred not as a matter of charity, but of commercial expediency in order to avoid the loss of tenants, and the consequent transfers, to which the licensing justices object. The meaning of par. 8 taken together with this par. A is, I think, simply this, that in the proper and reasonable conduct by the appellants of their trade they are obliged to defray the cost of these repairs, inasmuch as the same are necessary to enable the houses to serve the very purposes for which the appellants have solely and exclusively acquired and used them.

I may say for myself that I am wholly unable to follow the line of reasoning which would lead one to the conclusion that where premises have been acquired and used wholly and exclusively for a particular purpose, the expenditure upon them necessary to enable them to fulfil that purpose is not expenditure incurred solely and exclusively for the very purpose for which they have been acquired and used.

I think therefore that the condensed meaning of these paragraphs when properly construed is simply this, that the expenditure for repairs is incurred solely and exclusively for the purposes of the appellants' trade.

Item B is then dealt with in par. B of the supplemental statement. It is therein set forth that the appellants let their tied houses at considerably less than their annual value, or what they could get for them without a tie. And that in those cases where they themselves rent the houses they let them at rents considerably less than those they pay for them; that this low letting is not due to a change in the value of the premises, but is made deliberately and solely in order to get the market for their goods the tied houses supply, and the appellants, by means of this dealing with their houses, are enabled to make a profit upon their total trading transactions through the increased sale of their beer and other goods.

This is only another way of saying that the appellants let their tied houses at low rent solely and exclusively for the purpose of promoting their trade and enhancing the profits of it.

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It further sets forth that the figures represent the difference between the rents received by the appellants and those paid by them, and, in the case of their freehold houses, that between the net Sched. A assessment and the rents received.

As to item c, the purposes for which the insurances upon the premises are effected are set out. They are found to be usual and proper trade outgoings, and are made as such by the appellants. They are designed to cover the loss of the fabric by fire and the loss sustained if the licences were not renewed. *Smith* v. *Lion Brewery Co.* (1) applies, I think, to the latter disbursement, and the remarks I have already made apply to the former as well as to the remaining items D and F.

Now in the case of a trade the duty chargeable under s. 100 of the Act of 1842, Sched. D, Case 1, rule 1, is to be computed on the balance of the profits and gains on the fair average of the three years in the rule mentioned. It is well established that this balance is, prima facie, to be ascertained by deducting from the receipts of the trade the expenditure necessary to earn them. Until that has been done it is impossible to determine whether there has been any balance of profits at all: *Gresham Life Assurance Co.* v. *Styles* (2); *Ashton Gas Co.* v. *Attorney-General.* (3)

This rule, however, proceeds to enact that only those deductions which are thereinafter allowed are to be made. Deductions which, on ordinary business practice and principles, might be deducted are thus restricted.

Now despite this exclusion it has been decided by this House that a trader who owns and occupies premises in which he carries on his trade is entitled to deduct from his receipts the full annual value of those premises assessed under Sched. A: *Russell* v. *Town and County Bank.* (4) This is obviously right and just, because if he abstains from letting his premises and devotes them to the purposes of his trade he must be taken to have dedicated to that trade a sum equivalent to the annual sum which he might have obtained in the shape of rent if he had let them to an untied tenant.

(1) [1911] A. C. 150.
(2) [1892] A. C. 309, at pp. 323, 324.
(3) [1906] A. C. 10, at p. 12.
(4) 13 App. Cas. 418.

It was not disputed by the Crown in this case, and could not, I think, be successfully disputed, that if the trader held such premises on lease he would be entitled to deduct the rent he paid up to this annual value. The question how he acquired the premises is irrelevant. It was urged strongly by the Crown, however, that owing to this restrictive clause, coupled with the provisions of rule 3 and of rule 1, applying to the cases of both traders and members of professions, &c., and also to the provision of rule 1, Sched. A, s. 35, of the Finance Act of 1894, a deduction in respect of repairs could only be made where the trader himself was the occupier of the premises in which his trade was carried on, and that consequently the appellants, not being in occupation of these tied houses, could not claim to deduct anything in respect of repairs, nor when they sublet the houses to publicans at a lower rent than they themselves paid for them could they deduct from their receipts, as they claimed to do, the difference between the rents paid and the rents received.

Much of the argument turned upon the nature and extent of these prohibited deductions.

Rule 3 of the First Case under Sched. D deals with the prohibition of deductions in respect of repairs. On the construction of it contended for by the appellants, though in fact the landlord of a tied house should make all the repairs at his own expense, and the tenant, the occupier, in fact expend nothing for repairs, no deduction whatever should be made in respect of them from the receipts of the landlord's trade.

Sir Robert Finlay, for the appellants, on the other hand, contended that this is not the true construction of the rule; that it merely fixes a maximum sum for the deductions which can be made in respect of repairs in the particular instance specifically dealt with, namely, the case where the occupier makes the repairs, but does not exclude the operation in the landlord's favour of rule 1, applying both to cases of trades, professions, &c., and entitles the brewer to deduct the sum spent upon repairs provided he can show that it was expended wholly and exclusively for the purpose of his own trade.

Sched. A provides that for the purposes of assessment under that schedule the annual value of lands, tenements, and hereditaments

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shall be the rack rent at which they are or can be let. Sect. 35 of the statute of 1894, sub-s. (*b*) provides that (i.), where the owner is occupier or assessable as landlord, or where a tenant is occupier and the landlord undertakes to bear the cost of repairs, the assessment shall be reduced by one-sixth of its amount, and (ii.) that where the tenant is occupier and undertakes to bear the cost of repairs, the assessment is to be reduced by such a sum, not exceeding one-sixth part thereof, as may be necessary to reduce it to the amount of the rent payable by him.

It was contended for the respondent that these provisions show that the necessary expenditure on repairs is taken, on an average, to be about one-sixth of the full value, i.e., of the rack rent, that the landlord is relieved from paying income tax on this amount, and that to allow him to deduct the expenditure on repairs from the receipts of a trade carried on by him in the premises would in reality amount to enabling him to withdraw from liability to the tax the same sum twice over, at least to the amount of one-sixth of the assessment, and that the statute was obviously intended to limit the landlord's relief from taxation in respect of repairs to this fractional reduction of the assessment.

I own I am entirely unconvinced by this reasoning. I think the plain object of the statute was to limit the assessment to the benefit enjoyed. If the landlord was bound to repair, a deduction from the rack rent, actual or assumed, should be made to get at the real benefit enjoyed by him, namely, the rent received less the cost of repairs ; and if the tenant was bound to repair, as he would most probably pay a lesser rent by reason of that obligation, the aim was to reduce the assessment to the amount of the rent he actually paid the landlord. No doubt one-sixth of the assessment is fixed in this instance as the maximum limit.

The present case does not, on the facts, strictly come within either of these provisions, as the landlord bears the cost of the repairs as a necessary outlay for the purposes of his trade, though the tenant is legally bound to make them.

I am, however, quite unable to see that there is any necessary connection between assessments under Sched. A and those under Sched. D in this regard, or to discover upon what principle, if

an owner is relieved from taxation under Sched. A which would be excessive or unjust, the balance of his profits and gains is for the purposes of Sched. D to be inflated to a sum it never, in fact, reached, and he is to be assessed upon profits he never, in fact, made. For it is to be remembered that the Crown contended that, no matter how much the actual expenditure on repairs exceeded one-sixth of the assessment, the landlord was not permitted to deduct the overplus.

I now turn to the case of *Brickwood & Co.* v. *Reynolds.*(1) The decision, it would appear to me from the judgment of A. L. Smith L.J., pp. 102, 103, is based upon two propositions.

(1.) That the trade of a publican in a tied house is altogether independent of the trade of the brewer, and therefore the entire of the expenditure of money on the repairs of the houses could not be held to be expenditure wholly and exclusively for the purposes of the brewer's trade since it was, in addition, expended for the benefit of the trade of the publican.

With infinite respect for the Lord Justice I think this proposition is based upon a fallacy. The publican's trade is the vending of the landlord's beer and none other. The house is the market-place for that beer and none other. The brewer takes the house, ties it to his brewery, and puts the publican into it as tenant for the very purpose of having his beer sold in that market through the efforts of this salesman, the tied tenant.

The two trades are as dependent upon and as connected with each other as they well can be; they are almost, if not altogether, the same enterprise seen from different sides, different standpoints, and I confess I am unable to see upon what principle money designedly spent by the brewer with the sole and exclusive object of maintaining this market-place for his own goods, and promoting, through the action of this salesman, the sale of those goods therein, ceases to be an expenditure wholly and exclusively for his (the brewer's) trade because incidentally it may benefit the salesman and increase his remuneration in the shape of increased profits.

I am equally unable to see how the fact that this salesman, the tied tenant, has the secured position of a tenant, as distinguished

(1) [1898] 1 Q. B. 95.

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from the possibly more precarious position of a manager, makes a profit, and has to bear the loss on the resale of the brewer's beer, differentiates on this point the outlay on repairs in his case from a similar outlay on repairs where the salesman is merely a manager.

(2.) That this Case 1, rule 1, coupled with s. 159 of the statute of 1842, prohibits any person other than the person in possession from making a deduction in respect of repairs. At p. 103 A. L. Smith L.J. says: "Pausing there, what is the meaning of the word 'occupied'? To my mind the plain meaning is occupied by the person assessed."

He rejects the construction apparently put forward by counsel for the appellants at p. 99 of the report, that the words "occupied for the purpose of trade" contain a mere description of the premises, and holds that the rule should be construed as if it ran "On account of any sum expended for repairs of premises occupied by the person assessed for the purposes of such trade." It may well be that this is what the word "occupied" here means, and that the rule puts a limit on the amount of the deduction to be made by the occupant. Where I fail to follow the learned Lord Justice is in holding that this rule together with s. 159 prohibits a deduction in respect of expenditure for repairs made by a person other than the occupier if made wholly and exclusively for the benefit of the trade of that other carried on in the premises repaired.

A deduction of this latter kind is one of those enumerated in the rules. There are others mentioned in Scheds. A and B, ss. 63—67. It may well be that rules 1 and 3 above mentioned overlap each other to some extent, but when s. 159 enacts that no deductions are to be made other than those enumerated in the Act it does not appear to me that by these words a deduction expressly allowed by rule 1, s. 100, applicable to both cases, is prohibited. On the contrary, I think it is impliedly authorized, and the rights given under the two rules may, in my view, co-exist.

For these reasons I am of opinion that the case of *Brickwood & Co.* v. *Reynolds* (1) was wrongly decided; and that on the

(1) [1898] 1 Q. B. 95.

findings of the Commissioners, amounting to what I think they do, the appellants were entitled to make the deductions for repairs which they claim.

As to the next item, it must be conceded that if the appellants had put into occupation of a house a manager, as distinguished from a tenant, who managed their trade in the way I have described, they would, under the authority of *Russell* v. *Town and County Bank* (1), have been entitled to deduct the full annual value of the house as estimated under Sched. A, whether that house was a freehold or leasehold. I do not think it can possibly make any real difference in principle in respect to this right to deduct, if the salesman put into the tied house, to live in it (as he must do to obtain a publican's licence), happens to be a tenant and not a manager, though the brewer no doubt occupies the house in the one case, because the occupation of the manager is his occupation, and not in the other; but the balance of the profits and gains of the brewer's trade would, according to the methods of practical business men, be ascertained in the same way in both cases, i.e., by deducting from the receipts what it costs to earn them. Part of the cost to the brewer is, in the manager's case, his salary, and possibly a discount on profits. In the case of the tenant it is the difference between the annual value of his, the brewer's, freehold house and the rent he receives for it, and in his leasehold house the difference between the rent he receives for it and the rent he pays for it, if that be equal to the full annual value under Sched. A. For for the purposes of striking the balance of profits and gains the two cases are in principle undistinguishable.

The small items were not much contested in argument. I concur, however, with Horridge J. in thinking they ought to be allowed. For these reasons I am of opinion that the judgment appealed from was erroneous and should be reversed, and this appeal be allowed with costs.

LORD PARKER OF WADDINGTON. (2) My Lords, the provisions of the Income Tax Acts relating to the ascertainment of the amount of the profits and gains of a trade on which income tax is to be

(1) 13 App. Cas. 418. (2) Read by Lord Parmoor

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levied have often given rise to difficulty. According to the first rule, Case 1, s. 100, of the Act of 1842, the duty to be charged is to be "computed on a sum not less than the full amount of the balance of the profits and gains of such trade . . . . upon a fair and just average of three years." The expression "balance of profits and gains" implies, as has often been pointed out, something in the nature of a credit and debit account, in which the receipts appear on the one side and the costs and expenditure necessary for earning these receipts appear on the other side. Indeed, without such account it would be impossible to ascertain whether there were really any profits on which the tax could be assessed. But the rule proceeds to provide that the duty "shall be assessed, charged, and paid without other deduction than is hereinafter allowed." Grammatically this would seem to apply to deductions from the sum assessed and charged by way of income tax, and this construction would appear to be borne out by s. 159, the first part of which might well apply to deductions from the duty, and the remaining part to deductions in ascertaining the profits and gains upon which the duty is to be assessed; but it has been sometimes thought that both the words in question and the first part of s. 159 really apply to the latter class of deductions. The difficulty is that nowhere in the Act is there any express allowance or enumeration of deductions, the scheme of the Act being to prohibit certain deductions with certain exceptions. It has been suggested that the difficulty may be overcome by treating the exceptions from the prohibitions as impliedly allowed deductions. The better view, however, appears to be that, where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains, it ought to be allowed, notwithstanding anything in the first rule or in s. 159, provided there is no prohibition against such an allowance in any of the subsequent rules applicable to the case, and the decision of your Lordships' House in *Russell* v. *Town and County Bank* (1) and the speech of Lord Halsbury in *Gresham Life Assurance Society* v. *Styles* (2) clearly proceeded on this footing.

My Lords, I will now proceed to consider the other rules cited

(1) 13 App. Cas. 418. (2) [1892] A. C. 309, at p. 316.

as having an important bearing on the points which arise for decision in this case.

The third rule under Case 1 provides that in estimating the balance of profits and gains no deduction is to be made on account of any sum expended for repairs of premises occupied for the purposes of the trade, or for the supply or repairs or alterations of any implements employed for the purposes of the trade, beyond the sum usually expended for such purposes on a three years' average. This is a prohibition which, in my opinion, goes to the quantum only. It assumes that money spent in repairs or for the other purposes mentioned would be a proper item of deduction, but provides that where the property on which the money is expended is occupied or employed for the purposes of the trade the amount allowed is to be calculated on an average, leaving the question as to what may properly be allowed where the property is not so occupied or employed entirely untouched.

The Court of Appeal in *Brickwood & Co.* v. *Reynolds* (1) appears to have read the rule as containing not only an express prohibition with regard to quantum in certain specified cases, but also an implied prohibition against allowing anything at all in cases not so specified. I am unable to adopt this construction of the rule, which seems in conflict with the view adopted in *Russell* v. *Town and County Bank.* (2) If, for example, part of the trade consisted in letting houses or implements to be occupied or used otherwise than for the purposes of the trade, and it were necessary for the purposes of the trade to keep such houses or implements in repair, a deduction in respect of the money spent in repairs would be both proper and necessary in order to ascertain a balance of profits and gains, and such deduction, not being expressly prohibited, ought therefore to be allowed.

My Lords, I refrain from dealing with the subsequent parts of the third rule as having no relevance on the present occasion, and proceed to the first rule applicable to Cases 1 and 2.

This rule provides that in estimating the balance of profits and gains no sum is to be deducted for any disbursements or expenses whatever, not being money wholly and exclusively laid

(1) [1898] 1 Q. B. 95. (2) 13 App. Cas. 418.

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out or expended for the purposes of such trade. The rule also prohibits any deduction for the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade, not exceeding the proportion of the rent or value thereinafter mentioned. The last words apparently refer to s. 101, which provides that nothing is to restrain a person renting a dwelling-house, part whereof shall be used for the purposes of his trade, from deducting from the profits of such trade such sum, not exceeding two third parts of the rent bona fide paid for such dwelling-house, as the Commissioners shall allow. I can, however, find no similar provision in the case of annual value.

The case of *Russell* v. *Town and County Bank* (1) decides three points on the construction of this rule.

First, it decides that the annual value or rent of premises used wholly for the purposes of the trade is a proper deduction in ascertaining the balance of profits and gains.

Secondly, it decides that the rule refers only to a dwelling-house or domestic offices, or part of a dwelling-house or domestic offices, occupied by the person to be assessed; so that the fact that a bank manager resides in part of the bank premises does not bring that part of the premises within the prohibition or prevent the whole premises from being considered as used for the purposes of the trade. In other words, the effect of the prohibition cannot be extended by implication to cover a deduction for rent or annual value which would otherwise be a proper deduction in ascertaining the balance of profits and gains.

Thirdly, *Russell* v. *Town and County Bank* (1) decides, if not expressly at any rate by implication, that the first part of the rule which prohibits deductions for disbursements and expenses, not being money wholly and exclusively expended for the purposes of the trade, does not preclude a deduction for the annual value of premises used wholly for the purposes of the trade, though such annual value is not money expended in the ordinary sense of the word.

1) 13 App. Cas. 418.

I will now proceed to consider the facts of this case. The appellants are a brewery company and, like other brewery companies, have from time to time purchased licensed houses, which they let to tenants, who contract to buy from them all ale, beer, wines and spirits sold in the licensed houses, which are thus tied to the brewery. The tie enables the appellants to obtain from their tenants a higher price for the ale and beer which they brew, and the wines and spirits which they purchase elsewhere, than they can obtain from their other customers. Their profits are thus materially increased by the purchase and lease of the licensed houses in question, and it is solely with a view to such increase that these houses have been acquired and are let. Obviously the increased profits are assessable to income tax under Sched. D, and therefore all necessary cost and expenditure entailed by their possession must necessarily be brought into account in ascertaining the balance of profits and gains of the trade. The tenants of the tied houses occupy and use the premises let to them respectively, partly for the purposes of their trade as licensed victuallers and partly as dwelling-houses for themselves and their families. Though each tenancy agreement contains a repairing covenant on the part of the tenant, the tenant in fact does no repairs. The brewery company have found by experience that as a matter of commercial expediency it is better to do the repairs themselves rather than, by insisting on performance of the covenants, to run the risk of loss of tenants and consequent transfers to which the licensing justices object.

The appellants claim that the amount so spent in repairs ought to be deducted in ascertaining the balance of profits and gains of their trade, such repairs having, as found in the case, been solely repairs which the appellants were bound to do in order to maintain the licensed houses in a condition fit to use as licensed houses, and the sum expended not being an excessive sum to be expended in such repairs.

I am of opinion that the appellants are right in this contention. It is clear that not only were the tied houses acquired and let solely for the purposes of the trade, but that the repairs were necessary to maintain the houses in such a condition that they

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could be used for the purposes for which they were acquired and let.

There being, as I have before shown, no prohibition against making a deduction in respect of repairs in such a case, and the expenditure being wholly and exclusively for the purposes of the trade, it seems to follow from *Russell* v. *Town and County Bank* (1) that the deduction ought to be allowed. It is true that *Brickwood & Co.* v. *Reynolds* (2) is contrary to this view, but it should be noticed that in *Brickwood & Co.* v. *Reynolds* (2) there was no finding of fact which would take the case out of the prohibition against deductions in respect of moneys not exclusively expended for the purposes of the trade, and I have already dealt with this case so far as it is an authority for extending by implication the express prohibition contained in Case 1, rule 3.

In this connection I must refer, however, to an argument put forward by the Attorney-General. The annual value to be ascertained under Sched. A is calculated on the footing of the rent which a tenant might be expected to pay if the landlord did the repairs. This appears to have been thought a hardship on the party assessed, and accordingly by s. 35 of the Finance Act, 1894, the amount of the assessment is, for the purposes of collecting the tax, to be reduced by one sixth. The Attorney-General argued that inasmuch as there is only one income tax, under whatever schedule it be assessed, and inasmuch as a deduction for repairs is allowed under Sched. A, no similar deduction ought to be allowed under Sched. D, for if it were there would be a double deduction for the same thing.

I cannot accept this argument. The fact that the owner of land receives a partial exemption from the tax which would otherwise be payable under Sched. A can have, in my opinion, no possible relevance in ascertaining what as a matter of fact is the balance of his profits and gains for the purposes of Sched. D. It should be noticed, too, that in the present case the exemption from part of the tax under Sched. A cannot, or at any rate may not necessarily, benefit the appellants. It may enure solely for the benefit of the tenants of the tied houses, the

(1) 13 App. Cas. 418. (2) [1898] 1 Q. B. 95.

amount which they are entitled to deduct from the rent payable to their landlord remaining the same.

My Lords, some of the licensed houses which the appellants acquired for the purposes of their trade were of freehold and some of leasehold tenure, but the rent reserved in all the tenancy agreements on which they have been let is less, in the case of freeholds, than the annual value according to the Sched. A assessment, and, in the case of the leaseholds, than the rent which the appellants themselves have to pay.

The appellants claim to deduct, in the one case, the difference between the Sched. A assessment and the rent they receive, and in the other case the difference between the rent they pay and the rent they receive. In other words, they claim the Sched. A assessment value or the rent they pay as a deduction, giving credit on the other side of the account for the rent paid by the tenants of the tied houses.

I am of opinion that they are also right in this contention. Unless there is some express prohibition the case appears to be covered by *Russell* v. *Town and County Bank* (1), and I have already given my reasons for thinking that the express prohibition in the first rule, applicable to Cases 1 and 2, cannot be enlarged by implication so as to preclude a deduction necessary to ascertain the balance of profits and gains in any true sense of that expression. The right to make the deduction, however, must of course carry with it the obligations to give credit for the rents received from the tenants of the tied houses.

The only remaining point on this part of the case is the amount to be deducted in respect of annual value. Is it the full Sched. A assessment or is it such assessment less the one-sixth referred to in s. 35 of the Act of 1894? In default of any statutory provision to the contrary, it would clearly be the full amount of the assessment. But the 9th section of the Finance Act, 1894, provides that where in estimating the amount of annual profits or gains for the purpose of Sched. D any sum is deducted on account of the annual value of the premises used for the purposes of such trade, the sum so deducted is not to exceed the amount of the Sched. A assessment as reduced for the purpose of

(1) 13 App. Cas. 418.

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collection under s. 35 of the Finance Act, 1894. Can these tied houses be said to be used for the purposes of the brewery business within the meaning of this section? They cannot be said to be so used in the ordinary sense of the word. Premises used for the purposes of trade are prima facie in the possession of the person carrying on the trade, and the person carrying on the trade will be assessable to income tax under Sched. A in respect of them. In the present case the section would clearly apply in assessing the trade profits of the tenants of the licensed houses, but I have come to the conclusion that such application will exhaust its effect and that it cannot also apply in assessing the trade profits of the appellants.

My Lords, I have hitherto considered the questions which arise without reference to the case of *Smith* v. *Lion Brewery Co.* (1), but the ratio decidendi of that case in my opinion strongly supports the conclusion at which I have arrived. There the licensed houses had been acquired and let by the brewery company under precisely the same circumstances as in the present case, and it was held that the compensation levy imposed on the company as landlords by the Licensing Act, 1904, s. 3, was a proper deduction in ascertaining the balance of the profits and gains of the brewery business. Indeed, my noble and learned friend Lord Atkinson in his exhaustive judgment in that case instances the rent of premises acquired for the purposes of the trade as a deduction which ought to be allowed.

There is only one criticism which I should desire to make on this judgment. The noble Lord, after quoting a passage from the judgment of A. L. Smith L.J. in *Brickwood & Co.* v. *Reynolds* (2), appears to have expressed the opinion that the concluding words of rule 1 of the rules applicable to Cases 1 and 2 would prevent a deduction for repairs of those parts of the tied houses used by the tenants for domestic purposes. This does not seem to me to be in accordance with *Russell* v. *Town and County Bank* (3), in which it was held that the prohibition contained in the words in question applied only where the person using part of the house for domestic purposes was the

(1) [1911] A. C. 150. (2) [1898] 1 Q. B. 95.
(3) 13 App. Cas. 418.

party assessable under Sched. D. *Russell* v. *Town and County Bank* (1) does not, however, appear to have been cited in *Smith* v. *Lion Brewery Co.* (2)

My Lords, the appellants claim deductions under three other heads: (1.) fire and licence insurance premiums; (2.) rates and taxes; and (3.) legal and other costs. The Attorney-General did not object to these deductions being allowed, and, indeed, having regard to what I have already said and to the facts admitted in the supplementary statement (p. 7 of the appendix), it would be difficult to contend that they were not proper and necessary deductions in ascertaining the balance of profits and gains of the appellants' trade, or that they are within any of the prohibitions contained in the rules.

I am, therefore, of opinion that the appeal should be allowed.

Lord Sumner. My Lords, the question which arises at the outset of this case is, What facts have the Commissioners found? The jurisdiction of the High Court, and on appeals from it, is by s. 59, sub-s. 2 (*b*), of the Taxes Management Act, 1880, to "hear and determine the question or questions of law arising on a case transmitted under this Act." This involves the construction of the language of the case stated. It must be interpreted in the light of common knowledge and by the common sense of the language used; but the findings of fact, as such, when ascertained are final.

There is some dispute here as to the precise meaning of some of the statements in the case. The difficulty arises because Horridge J. ordered that the case should go back to the Commissioners for further statement, unless the parties agreed a supplemental statement of the facts, and the parties in agreeing upon an additional paragraph to be stated in the case have used different language in respect of almost every item in question.

The paragraph states that payments for repairs to tied houses and rates and taxes chargeable in respect of them have been made by the appellants, not because of a legal liability to do so, but because it is "necessary in order to avoid the loss of tenants

(1) 13 App. Cas. 418. (2) [1911] A. C. 150.

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and consequent transfers to which the licensing justices object"; that tied houses are let at an undervalue "solely in order to get the trade which the using of such houses as tied houses affords"; that the payment of premiums of insurance is "a usual and proper trade outgoing, and is made by the appellants as such"; and that "lawyer's charges" in respect of the said tied houses "have been paid by the appellants as such." It would have been simpler if the parties had agreed their additional statement in the phraseology of the Act, but no doubt it was the result of negotiation, with some give and take on both sides. All questions that could be raised on the whole case (and they were many) were intended to be left open. I think that, in the context in which these expressions are used, all alike mean that the disbursements and expenses in question, money foregone being properly within these words, were "money wholly and exclusively laid out or expended for the purposes of such trade," that is to say, the brewer's trade.

In the judgment appealed from it is said, "I can see no such finding of fact in this case." This is so in terms, but in substance it is otherwise. Furthermore, the judgment seems to say that the question whether a given disbursement is "wholly or exclusively laid out for the purposes of the trade or concern" is a question of law and not of fact. With this I am not able to agree. Though the answer to the question may itself be an inference from a wide area of facts, it is an answer of fact. There is no suggestion here that the Commissioners found the facts under any mistake in law, including in that term the view, conscious or unconscious, that a fact may be found which there is no relevant evidence to support. As to the paragraph agreed by the parties, I doubt if such a suggestion would be competent—at any rate it is not made. Findings that the brewers' motive was "commercial expediency," or their mental processes were "deliberately" gone through, can be severed from the findings above mentioned.

The questions of law raised are, and are only, whether, on the construction of the Act, the deductions in debate, though "disbursements or expenses, being money wholly and exclusively laid out or expended for the purposes of the trade" (that is, the

brewer's trade), are nevertheless forbidden. I think that the judgment appealed against really finds facts, and does not, as it was supposed to do, rule the law, when it declares that the rents foregone are losses of annual value and not expenses of trade, that the described expenses are moneys laid out partly for the publican's trade, and, therefore, not "wholly and exclusively" for the brewer's trade, and that such moneys enter into a computation of the profits or gains of the brewer's trade because, in the view of the Court, they also enhance the value of his goodwill.

If a subject engaged in trade were taxed simply upon "the full amount of the balance of the profits or gains of such trade," there can be no doubt that, upon the facts found in this special case, he would be entitled to deduct all the items which are now in debate before arriving at the sum to be charged. To do otherwise would neither be to arrive at a balance between two sets of figures, a credit and a debit set, which balance is the profit of the trade, nor to ascertain the profits of the trade, for trade incomings are not profits of the trade till trade outgoings have been paid or allowed for and deducted.

Rule 1 of the First Case of Sched. D does not, however, leave matters to the taking of a commercial account simpliciter; it provides that the duty shall be "assessed, charged, and paid without other deduction than is hereinafter allowed," and this must mean, though it is not strictly expressed, "without other deductions in the computation of the sum on which the duty is charged." Sect. 159 states it thus: "In the computation of duty to be made under this Act in any of the cases before mentioned . . . . it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act," and here "therefrom" is not from the duty but from the sum, whatever it be, that has to be ascertained before duty can be charged on it. Virtually both provisions mean that in computing the sum which, when ascertained, is to be charged with duty, only the enumerated deductions shall be lawfully allowable.

The paradox of it is that there are no allowable deductions

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expressly enumerated at all, and there is in words no deduction allowed at all, unless indirectly by the words in rule 3 of the First Case, namely, repairs "beyond the sum usually expended for such purposes according to an average of three years"; loss "not connected with or arising out of such trade"; debts, "except bad debts proved," and average loss "beyond the actual amount of loss after adjustment," and by the words in rule 1 applicable to both the first two cases, namely, expenses "not being money wholly and exclusively laid out or expended for the purposes of such trade"; and rent, "except such part thereof (i.e., of the premises) as may be used for the purposes of such trade."

The effect of this structure, I think, is this, that the direction to compute the full amount of the balance of the profits must be read as subject to certain allowances and to certain prohibitions of deductions, but that a deduction, if there be such, which is neither within the terms of the prohibition nor such that the expressed allowance must be taken as the exclusive definition of its area, is to be made or not to be made according as it is or is not, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it.

My Lords, I may now deal with the specific matters in respect of which the brewers sought to make deductions in this case. There is no expressed prohibition of the deductions for repairs at all, but it is said that they are the subject of a limited allowance, so that, whether they would or would not be properly debited in the brewery profit and loss account, they cannot be lawfully deducted here unless they come within the words "repairs of premises occupied for the purposes of such trade," that is, of the brewery trade. This may or may not be so, but it does not advance the argument. The question is, "occupied" by whom? If by the person who actually occupies, the clause does not apply here, for this case is not one of a brewer seeking to deduct the cost of repairing premises, which he himself occupies. If the meaning is occupied in fact, for the purpose of the brewer's trade, by some one, be he who he may, the clause would apply in favour of the appellants. Personally I incline to

the latter view, thinking that there is no warrant for interpolating "by the taxpayer" after "occupied" and so limiting by implication a provision which is expressed in favour of the subject, but the result is the same either way. The deduction for these repairs is not prohibited by this clause, and it is allowable either under the words "balance of the profits or gains," or under the words "money . . . . exclusively laid out . . . . for the purposes of such trade."

Next as to the rent. A trader who utilizes, for the purposes of his trade, something belonging to him, be it chattel or real property, which he could otherwise let for money, seems to me to put himself to an expense for the purposes of his trade. Equally he does so if he hires or rents for that purpose property belonging to another. The amount of his expense is prima facie what he could have got for it by letting it in the one case, and what he pays for it when hiring it in the other. Where he gets something back for it, while employing it in his trade, by receiving rent or hire for it in connection with that trade, the true amount of his expense can only be arrived at by giving credit for such receipt.

In principle, therefore, I think that in the present case rent foregone, either by letting houses, which the brewers own, to tied tenants at a low rent instead of to free tenants at a full rack rent in the open market, or by letting houses in the same way, which they hire and then re-let at a loss, is money expended within the first rule applying to both of the first two cases of Sched. D, and that upon the findings of the special case, which are conclusive, it is "wholly and exclusively expended for the purposes of such trade."

It is said that such expenditure is not "wholly and exclusively expended." In so far as any questions of law arise here—and it is not clear that there are any—I think that the decision in *Smith* v. *Lion Brewery Co.* (1) disposes of them. Where the whole and exclusive purpose of the expenditure is the purpose of the expender's trade, and the object which the expenditure serves is the same, the mere fact that to some extent the expenditure enures to a third party's benefit, say that of the publican,

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or that the brewer incidentally obtains some advantage, say in his character of landlord, cannot in law defeat the effect of the finding as to the whole and exclusive purpose.

A similar answer may be made to the contention that this deduction is expressly prohibited by the words "nor for the rent . . . . of any dwelling-house . . . . except such parts thereof as may be used for the purposes of such trade." On the findings here the brewer is a brewer first and a landlord only afterwards. His rôle as landlord is subsidiary, an incident of his trade as brewer. If the "dwelling-house" here is the taxpayer's own dwelling-house, cadit quaestio. It is not this case. If the deduction is a proper one in arriving at the "balance of profits or gains," as it clearly is, and is not prohibited by any construction of the words "expenses, not being money wholly and exclusively laid out . . . . for the purposes of such trade," as I think it equally clearly is not, there is nothing to prohibit it in the words in question. The prohibition does not say "used by the taxpayer who claims the deduction," and I do not see why this restriction should be implied. Further, the fact that the publican sleeps over the bar does not in itself preclude the possibility that his bedroom when so used is used for the brewer's trade, if, as here, the brewer, in order to get the outlet for his beer which a tied house gives, must find a tenant who sleeps as well as sells on the premises. On the findings of fact here, even if the words "by the brewer" be implied after the word used, as I think they should not be, it is impossible to say that the case is not sufficiently brought within the allowance so read. There is no "wholly or exclusively" in this sub-clause.

My Lords, the respondent's argument, based on the fact that rent, as rent, is chargeable to income tax under Sched. A, and that repairs, as such, form the subject of a conventional deduction under that schedule, is one which I find it difficult to answer only because I find it difficult to understand.

As an argument "the scheme of the Act" is all very well, but I think it is pressed too far. The notion seems to be that if a trader chances to be a landlord his liabilities and his rights in connection with income tax so far as his houses are concerned

are to be exclusively dealt with under Sched. A, as though Sched. D did not exist. The effect is that having paid duty under A in respect of the houses, he has also to pay duty under D on profits which really he has not earned. If he has, in fact, repaired premises for the purpose and with the result of earning profits, and the expense ought, as a matter of business, to be debited to profit and loss, then in this argument he is made to pay under D, on what he has not earned, since the debit of the repairs would have taken that much off the profits, and is told that he has been excused something under A, which may or not be the cost of the repairs but is said to be deducted for repairs. The two things, repairs for allowance under A and expenses for the purposes of trade as an item in finding out what profits there are to be taxed under D, though they chance to be for repairs, are not in pari materia. It is all very well for the tax-gatherer to reap where he has not strawed; it is too much (unless the Legislature says so) that he should tax not only the harvest, but also the seed.

The remaining items, rates and taxes, premiums and costs, call for no special observation. In my view, the case means to find them all to be disbursements and money "wholly and exclusively expended for the purposes of the trade," and that being so in fact, I think there is no reason why they may not be so in law. They are accordingly covered by the decision on the rent and the repairs.

I think that the questions raised by the case stated should have been wholly answered in favour of the now appellants, and that the judgments of the Court of Appeal and, pro tanto, of Horridge J. were wrong and should be reversed, and that this appeal should be allowed.

Lord Parmoor. My Lords, the appellants are a brewery company who own or lease a number of tied houses. These houses are in the occupation of tenants of the appellants. The appellants claim to make certain deductions in respect of expenditure or disbursements laid out or expended on these houses from the assessment of income tax on their trade profits under

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Sched. D of the Income Tax Act, 1842. These deductions are ranged under five heads:—

	£	s.	d.
(A) Repairs to tied houses . . .	1004	0	10
(B) Difference between rents of leasehold houses or Sched. A assessment of freehold houses on the one hand, and rents received from tied tenants on the other hand .	2134	14	6
(C) Fire and licence insurance premiums.	90	7	6
(D) Rates and taxes	38	7	6
(F) Legal and other costs . . .	56	7	0

The Commissioners disallowed all the claims. Horridge J. disallowed claim (A) but allowed claims (B), (C), (D), (F). The Court of Appeal disallowed all the claims, and against this decision the appellants appeal.

Before considering the rules and sections of the Income Tax Acts on which the questions raised in the appeal depend, it is essential to have a clear determination of the relevant facts.

The Commissioners have found that the profits derived from the sales to the tied houses are included in the assessment; that these houses have been acquired by the appellants, and are held by them, solely for the purpose of their trade; that the possession and employment of these houses are necessary to enable the appellants to earn the profits on which they pay income tax; that, except for the purpose of and for employment in their trade, the appellants would not possess these houses. There are, further, special findings in reference to particular heads of claim. There is no suggestion that there was not relevant evidence on which the findings of the Commissioners might be based, and it is not said that the amounts expended are either excessive or extravagant.

The result of the findings of the Commissioners is that all the expenditure claimed as a deduction has been incurred on or in connection with premises solely acquired for the purpose of the trade of the appellants, and of which the possession and employment are necessary to enable them to earn the profits on which they pay income tax. These findings of the Commissioners must be accepted, and the Courts are precluded from questioning

them except so far as it is necessary to see whether there is relevant evidence.

In *De Beers Consolidated Mines* v. *Howe* (1) Lord Loreburn L.C., referring to a finding of fact by the Commissioners, says: "These conclusions of fact cannot be impugned." In *Smith* v. *Lion Brewery Co.* (2) Lord Halsbury says: "The facts are ascertained for us. There is no doubt that from time to time in ascertaining what is the taxable amount it might be an extremely difficult problem; but these facts have been ascertained for us and so ascertained that I do not think it is competent for us to go out of what has already been determined by the tribunal which the Legislature has considered sufficient to determine the form in which such a question if it arises should be determined." It would be unnecessary to emphasize this matter but for the opinion expressed by the President of the Probate, Divorce, and Admiralty Division, in delivering the judgment of the Court of Appeal, that the question whether the disbursements or expenses were wholly and exclusively laid out for the purposes of the trade of which the profits are taxed is a question of law. With great respect to the President, this proposition appears to me to contravene a well-established principle, and one which it is of great importance to maintain in cases which arise under the Income Tax Acts.

The first rule of the First Case of the Income Tax Act, 1842, directs that the duty to be charged in respect of any trade shall be computed at a sum not less than the full amount of the balance of the profits or gains of such trade upon an average of three years. The balance of the profits or gains of a trade is struck by setting against the receipts all expenditure incidental to the trade which is necessary to earn them, and by applying, in the computation, the ordinary principles of commercial trading.

In the present case the Commissioners have found that the possession and employment of the tied houses are necessary to enable the appellants to earn the profits on which they pay income tax. I think it follows that expenditure reasonably incurred on or in connection with such houses is an expenditure

(1) [1906] A. C. 455. (2) [1911] A. C. 150.

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incidental to the trade and necessary to earn the profits taxed, and would be set against the receipts of the trade in an ordinary commercial balance sheet.

No auditor could properly pass a balance-sheet unless such a deduction had been made.

I agree, therefore, with the first proposition put forward by Sir R. Finlay, that unless there are subsequent statutory limitations disallowing the deductions, or any of them, the deductions must be included in the balance-sheet and set against the receipts of the trade, and that unless this is done the balance of profits or gains cannot be accurately computed.

The same rule further directs that the duty shall be "assessed, charged, and paid without other deduction than is hereinafter allowed." It is not necessary to attempt to give an exhaustive meaning to these words, but a deduction is thereinafter allowed under the first rule of Cases 1 and 2 for disbursements or expenses, being money wholly or exclusively laid out or expended for the purpose of the trade on which the income tax is paid. The question which arises is whether the statement of facts brings the various heads of expenditure for which a deduction is claimed within this condition. In my opinion it does. It is found that the expenditure under head (A) was incurred on repairs which the appellants were bound to do in order to maintain the tied houses in a condition fit for licensed premises, and that as to head (B) the sole inducement of the appellants to let tied houses at less than their proper rent was to obtain a larger profit from their business of brewers.

As to the expenditure under the heads (C), (D), and (F), I agree with Horridge J. that they are all items of expenditure essential to the earning of the profits on which income tax is payable, and, further, that they come within the principle of the decision of this House in *Smith* v. *Lion Brewery Co.* (1)

The third rule of the First Case provides that in estimating the balance of profits or gains chargeable under Sched. D, or for the purpose of assessing duty thereon, no sum shall be set against or deducted from such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of

(1) [1911] A. C. 150.

such trade beyond the sum usually expended for such purpose according to an average of three years preceding the year in which such assessment shall be made. Apart from the form in which it is expressed, the meaning of this provision is tolerably clear. In calculating any balance of trade on usual business principles, the cost of repairs of the premises occupied for the purpose of such trade would be deducted and set against the receipts. The rule provides that the sum to be allowed shall not exceed the sum usually expended on an average of three years preceding the year in which the assessment is made. The prohibition is not against any deduction in respect of the repairs of the premises occupied, but against the deduction of a larger sum than ascertained in a three years' average. A similar principle of obtaining the proper rate of deduction under the head of repairs is usual in compensation cases, in which a three or five years' average is not uncommonly taken. The question arises whether this rule operates to prohibit any deduction under head (A) of the claim. In my opinion it has no application. The tied houses are not occupied by the appellants, and both the prohibition and permission in the rule are limited to the same subject-matter, namely, premises so occupied.

In the Court of first instance Horridge J. held that the decision of the Court of Appeal in the case of *Brickwood & Co.* v. *Reynolds* (1) was binding upon him, and negatived the claim to a deduction under head (A). The President of the Probate, Divorce, and Admiralty Division, in giving the decision of the Court of Appeal, took the same view, and further expressed the opinion that the decision rested on sound principles, and was not inconsistent with the decision of this House in *Smith* v. *Lion Brewery Co.* (2)

With great respect for the Lords Justices who concurred in the judgment in the case of *Brickwood & Co.* v. *Reynolds* (1), I cannot agree that the third rule of the First Case excludes any claim for repairs to tied houses. The contention made in that case is stated to have been: "That inasmuch as by doing the repairs to the tied houses they keep up and foster the trade of a publican, which is a wholly independent trade, they are entitled to deduct

(1) [1898] 1 Q. B. 95. (2) [1911] A. C. 150.

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the cost of the repairs to the publicans' houses before arriving at the balance of the profits and gains of their own trade as brewers."

No such contention was raised by the appellants in the present case. On the contrary their contention is founded on the statement of fact that the tied houses were held by the appellants solely for the purpose of their business as brewers, and that the repairs to such houses were solely repairs which the appellants were bound to do in order to maintain such houses in a condition fit to use as licensed premises.

It is not very clear on what statement of fact the Court of Appeal founded their decision in the *Brickwood Case* (1), but for the purposes of the decision it was held that the deduction claimed was not an expense wholly or exclusively laid out or expended for the purpose of the trade to be taxed. Any expense not so laid out or expended would be expressly excluded under the first rule of the First and Second Cases. Apart from the contentions raised, and from the statement of facts in the case, A. L. Smith L.J. expressed the opinion that expenditure on the repair of premises not occupied by the person assessed is not merely not allowed as a deduction but expressly disallowed by this part of the Act. My Lords, I cannot assent to this proposition. In my opinion the rule has no application whatever to expenditure on the repair of premises not occupied by the brewer assessed.

I further agree with Horridge J. that, apart from head (A), the deductions cannot be disallowed without disregarding the authority of the decision of this House in *Smith* v. *Lion Brewery Co.* (2) The statement of facts in that case was in all material particulars similar to the statement of facts in the present case. No doubt the special deduction sanctioned was the charge payable in respect of the compensation levy imposed by the Licensing Act of 1904, but I can see no principle on which, if such a deduction is allowed, the deductions claimed by the appellants should be disallowed. It can make no difference that the charge is a statutory one, so long as it is made for the sole purpose of earning the profit on which the income tax is paid.

(1) [1898] 1 Q. B. 95. (2) [1911] A. C. 150.

A suggestion was made that if the deduction under head (B) is allowed, the amount of 2134*l.*, or a portion thereof, might escape the income tax altogether, since the tenant's profits under Sched. D would be calculated not on the rents paid to the appellants but on actual annual values. I think that there are two answers to the suggested difficulty. In the first place, whatever may be the effect of Sched. A on the deductions to be made for the purpose of computing tenants' profits under Sched. D, this is not a relevant consideration, and cannot affect the proper deductions to which the appellants are entitled in order to arrive at the balance of profits on a different trade. There would be no place for such an item in a commercial balance-sheet limited to the appellants' trade. In the second place, it is a confusion of language to say that the sum of 2134*l.* escapes taxation. It is a sum expended to earn the profits on which income tax is charged, and whenever the consequent receipts are larger than the expenditure incurred to earn them there is an increase, and not a diminution, in the balance of profits or gains on which income tax is chargeable.

I have not overlooked s. 159 of the Income Tax Act, 1842, but deductions made under the rules to which reference has been made come within the words "deductions enumerated in the Act."

My Lords, in my opinion the appellants are entitled to claim all the deductions ranged under the five heads, and the appeal should be allowed, with the order as to costs which has been proposed.

Order of the Court of Appeal reversed. The respondent to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, December 4, 1914.

Solicitors for appellants: *Godden, Holme & Ward.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.)* 1914 Dec. 1.

COMMISSIONERS OF INLAND REVENUE . APPELLANTS;

AND

BROOKS . . . . . RESPONDENT.

Revenue—Income Tax—Super-tax—Assessment—Assessment for Previous Year under Sched. D, whether binding for Purposes of Super-tax—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 66, 72.

For the purpose of assessment to super-tax under s. 66 of the Finance (1909-10) Act, 1910, the sum at which the taxpayer has been assessed to income tax under Sched. D for the year preceding the year of assessment to super-tax is not conclusive and binding on the Special Commissioners, and the taxpayer may prove what was in fact his income for such preceding year.

Decision of the Court of Appeal [1914] 1 K. B. 579 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Horridge J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts. (2)

The question raised by this appeal was whether, when an assessment to income tax payable under Sched. D has been duly and finally fixed on appeal by the Commissioners having jurisdiction in that behalf, it must be taken as a basis for computing income for the assessment of super-tax, or whether such assessment can be reopened before the Special Commissioners, and evidence tendered to show that it was wrong.

The respondent, who had for several years carried on business as a waste dealer at Brookbottom, Mossley, in the county of Lancaster, appealed in July, 1911, against an assessment to super-tax made upon him for the year ending April 5, 1910, in the sum of 8064*l.*, less the statutory allowance of 3000*l.* For the purpose of arriving at the income, for super-tax purposes, of the respondent for the year ending April 5, 1910, it was necessary, by virtue of s. 66, sub-s. 2, of the Finance (1909-10) Act,

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

(1) [1914] 1 K. B. 579. (2) [1913] 3 K. B. 398.

1910, to arrive at the total income of the respondent from all sources for the year ending April 5, 1909.

For the year ending April 5, 1909, the respondent had been assessed to the income tax, Sched. D, in respect of his business in the following way. He was assessed in a first assessment in the sum of 400*l.*, and in an additional first assessment in the sum of 3600*l.*, making 4000*l.* in all. Against this latter assessment he appealed to the Commissioners for General Purposes for the Division of Middleton, in the county of Lancaster, who were the Commissioners having jurisdiction in the matter. The Commissioners on May 9, 1910, found as a fact that the amount of the respondent's profits assessable to tax for the year ending April 5, 1909, arrived at, in accordance with the Acts, on the average of the three preceding years, was 6331*l.*, and, acting in accordance with the powers conferred upon them by s. 57, sub-s. 8, of the Taxes Management Act, 1880, they charged the respondent in an additional sum of 2331*l.*, making the total sum in respect of which the respondent was charged under Sched. D for the year ending April 5, 1909, the sum of 6331*l.*

The respondent, being so assessed, did not require any case to be stated for the opinion of the High Court, and the appeal consequently became a final adjudication of the matter under s. 57, sub-s. 10, of the Taxes Management Act, 1880. The duty on the sum assessed, namely, 6331*l.*, was paid by the respondent.

On June 10, 1910, the respondent was required to make a return of his income for purposes of assessment to super-tax in respect of the year ending April 5, 1910. On August 20, 1910, the respondent delivered a return in which he declared his income from his business as waste dealer for the year ending April 5, 1909, to be 400*l.*, and his total income from all sources for the said year to be 2039*l.* 3*s.* 4*d.* The Special Commissioners, being dissatisfied with this return, made an assessment of the respondent, which was the subject of this appeal, in the sum of 8064*l.*, being 6331*l.* in respect of the profits of the business and 1733*l.* income from other sources. In arriving at this figure the Commissioners accepted as final the assessment of the respondent by the Commissioners for General Purposes for the year ending

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April 5, 1909, and refused to hear further evidence on the point or otherwise to reopen the decision.

No question arose with regard to the income from sources other than the business, for, in respect of the income from these other sources, the respondent accepted the assessment of the Special Commissioners. In respect of the income from his business of waste dealer the respondent claimed that he was not bound by the earlier assessment of May 9, 1910, made by the Commissioners for General Purposes, and on the Special Commissioners deciding against this contention he required them to state a case.

Horridge J. was of opinion that the question was concluded in favour of the respondent by *Wylie Hill* v. *Commissioners of Inland Revenue* (1), and he gave judgment for the respondent without costs, and his decision was affirmed by the Court of Appeal (Cozens-Hardy M.R. and Swinfen Eady L.J., Phillimore L.J. dissenting).

1914. Oct. 21, 22. *Sir John Simon, A.-G.*, and *Sir Stanley Buckmaster, S.-G.* (with them *W. Finlay, K.C.*), for the appellants. The question is whether, in estimating for the purposes of super-tax the total income of a subject who has already been assessed by the General Commissioners under Sched. D in respect of that part of his income which is derived from trading profits, the Special Commissioners are bound by that assessment, or whether the subject can require them to review it. Super-tax is in fact an additional income tax imposed by the Finance Act of 1910, which incorporates all the previous Income Tax Acts, and for the purposes of super-tax the total income is to be estimated in the same way as for the purposes of exemption or abatement. (2) [They referred to the Finance (1909-10)

(1) 1912 S. C. 1246.

(2) Part IV. of the Finance (1909-10) Act, 1910, which is headed "Income Tax" and consists of ss. 65—72 inclusive, provides (so far as material) as follows:—

Sect. 66, sub-s. 2: "For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions and abatements under the Income Tax Acts; . . . ."

Sect. 72, sub-s. 1: "The super-tax

Act, 1910, Part IV., ss. 65, 66, 72, 96, sub-s. 4; the Income Tax Act, 1842, ss. 111, 118, 163, 164, 190, Sched. G, No. XVII.; and the Taxes Management Act, 1880, s. 57, sub-ss. 3, 10; and to *Bowles* v. *Attorney-General* (1) and *Bartlett* v. *Inland Revenue Commissioners*. (2)] But a person claiming exemption or abatement under the Act of 1842 would be bound, when an assessment had been made, to return the amount assessed as an element in the calculation of income from all sources. Further, sub-s. 10 of of s. 57 of the Taxes Management Act, 1880, expressly provides that an assessment duly fixed on appeal and not corrected by the High Court on a case stated is final at all times and in all places.

Wylie Hill v. *Commissioners of Inland Revenue* (3) is distinguishable, because in that case the appellant was not seeking to alter the assessment, but was claiming an adjustment of liability after the assessment was made. The Commissioners are none the less "estimating" the total income for the purposes of super-tax because one element of that total may have been already assessed and finally determined. There is an obvious inconvenience in allowing the Special Commissioners to undo the work done by the General Commissioners. The appellants rely upon the reasoning of Phillimore L.J. in the Court of Appeal.

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shall be assessed and charged by the Commissioners for the Special Purposes of the Acts relating to Income Tax (in this Act referred to as the Special Commissioners)."

Sub-s. 5: "If any person fails to make a return under this section, or if the Special Commissioners are not satisfied with any return made under this section, the Special Commissioners may make an assessment of the super-tax according to the best of their judgment."

Sub-s. 6: "All provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments, and appeals against those assessments, and to the collection and recovery of duty, and to cases to be stated for the opinion of the High Court shall, so far as they are applicable, apply to the charge, assessment, collection, and recovery of duty under this section, ..."

Sect. 96, sub-s. 4 (in Part VIII.) provides: "Part IV. of this Act shall be construed together with the Income Tax Acts, 1842 and 1853, and any other enactments relating to income tax, and those enactments and Part IV. of this Act are in this Act referred to as the Income Tax Acts."

(1) [1912] 1 Ch. 123.
(2) [1914] 3 K. B. 686.
(3) 1912 S. C. 1246.

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Ryde, *K.C.*, and *F. Brocklehurst*, for the respondent. The intention of the Legislature was that the Special Commissioners in dealing with super-tax should form an independent estimate of the income of the taxpayer. Sect. 57, sub-s. 10, of the Act of 1880 does not show that the decision of the General Commissioners on an appeal against an assessment to income tax is binding on the Special Commissioners in dealing with super-tax. The subsection means that there is to be no further appeal in that particular matter, not that the decision is to be final for all purposes. *Wylie Hill* v. *Commissioners of Inland Revenue* (1) supports the respondent's case.

Sir John Simon, *A.-G.*, in reply, referred to *In re Calvert*. (2)

The House took time for consideration.

Dec. 1. EARL LOREBURN. My Lords, I should have been glad to accept the Attorney-General's argument, because I cannot help feeling that the construction rightly placed on this Act by the Court of Appeal is likely to result in considerable inconvenience without any corresponding benefit. But upon the whole I cannot escape from the conclusion at which they felt themselves bound to arrive.

The substance of the controversy is this. In order to fix ordinary income tax the General Commissioners must find what is the average of gains and profits made in his business by a particular trader during the specified three years. When this figure has been determined on an appeal the determination is final under s. 57, sub-s. 10, of the Act of 1880. In order to fix super-tax, which is declared to be a duty of income tax, the amount has to be estimated by Special Commissioners, and they are required to estimate the total income in the same way as in case of exemptions from the ordinary income tax. The tribunal is different but the principle is to be the same. In the present case Mr. Brooks' average income for the three years from his business was determined by the General Commissioners on appeal to be 6331*l*. When he was required to pay super-tax it was necessary to ascertain this average income for the same three

(1) 1912 S. C. 1246. (2) [1899] 2 Q. B. 145.

years, because the result would be a part of his total income upon which he had to pay super-tax. But being dissatisfied with the determination of the General Commissioners he claimed that he was not bound by this determination for super-tax purposes, and requested the Special Commissioners to investigate it over again and come to their own conclusion. The Crown claimed that he was bound by what had been already determined. We have to say whether he is bound or not.

I do not think we can say that, apart from statute, there is an estoppel, because ss. 66 and 72 of the Act of 1909-10 tell us that the figures for super-tax are to be estimated by the Special Commissioners. Therefore the sole question is whether, on the construction of the Act of 1909-10, which brought super-tax into existence, the Special Commissioners are obliged to accept the determination of the General Commissioners.

It was argued that the whole of the Income Tax Acts are incorporated with the Act creating super-tax, and that, therefore, s. 57, sub-s. 10, must be applied, and the determination of the General Commissioners on the figure in question is final and binding on the Special Commissioners. It is quite possible, indeed probable, that this was intended, but when I look at s. 57, sub-s. 10, it seems to me that it does not say more than that the determination is final as regards an assessment for that tax, and no further appeal upon it is to be entertained by that tribunal. The language used is as follows: "Appeals once determined by the General Commissioners, or by the major part of them present on the day appointed for the hearing of appeals, shall be final; and neither the determination of the Commissioners nor the assessment then and there made thereupon shall be altered at any subsequent meeting, or at any other time or place, except by order of the High Court when a case has been required as provided by this Act."

It does not say that the determination is to be final for all purposes. When, therefore, another tax is imposed by another statute, whether it be a duty of income tax or not, and a different tribunal is directed to estimate the same figure as part of a greater whole, I do not read the section as imposing upon the new tribunal a duty to accept the determination of the old. It

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seems a great pity that such a piece of work should be done over again, and an unnecessary vexation and expense to the Crown, but the possibility has been left open in the wording of a difficult Act dealing with an intricate subject.

I think this appeal should be dismissed.

LORD ATKINSON. My Lords, I concur. The respondent was in respect of the balance of the profits of his business for the year ending April 5, 1909, assessed to income tax under Sched. D in the sum of 400*l.* by a first assessment, and in the further sum of 3600*l.* by a second assessment. He appealed against this second assessment to the Commissioners for General Purposes for the Division of Middleton, in Lancashire, who raised his assessment to 6331*l.* He did not apply under the 59th section of the Taxes Management Act, 1880, to have a case stated, but paid the tax on this sum of 6331*l.*

On June 10, 1910, the Special Commissioners required him to make a return of his income from all sources for the purpose of assessment for super-tax for the year ending April 5, 1910, in pursuance of s. 72, sub-s. 2, of the Finance Act of 1910.

The respondent, in reply to this requisition, declared that his income from his business was 400*l.* per annum, and his income from all sources 2039*l.* 3*s.* 4*d.* per annum.

The Special Commissioners being dissatisfied with this return, in exercise of their powers under sub-s. 5 of s. 72, assessed him in the sum of 8064*l.* as his total income, including the sum of 6331*l.* in which he had already been assessed by the said Commissioners for General Purposes.

In reference to this last item, it was, on behalf of the appellants, contended that the assessment made upon appeal was, as it were, a chose jugée, and that the Special Commissioners were bound under the provisions of s. 66, sub-s. 2, of the Act of 1910 to take that sum as the income of the respondent from his business, for the purposes of the super-tax for the year ending April 5, 1910.

The Commissioners yielded to this contention, and held themselves precluded from receiving the evidence which the respondent tendered to show that this assessment was erroneous,

and that his true income from his business was 400*l.* as he had declared.

The sole question for decision upon this appeal is whether these Commissioners were, upon the true construction of this sub-s. 2, right in so holding, or whether they were not bound to estimate de novo for themselves the amount of the respondent's income from all sources, including his trade and business.

By the said 66th section an additional income tax, styled a super-tax, for the year commencing on April 6, 1909, on the excess over 3000*l.* per annum of the income of any individual whose total income from all sources exceeds 5000*l.* per annum, is imposed.

It may well be, and no doubt often is, that the only source of income of such a person is the balance of the profits and gains of his trade, business, or profession in respect of which he is assessable to ordinary income tax under s. 100, Sched. D, of the Act of 1842. No indication, however, is given in this section that the amount of these profits and gains, determined for the purposes of that schedule, is to be accepted without investigation by the Special Commissioners as the true amount of the taxpayer's income from the profits of his trade or business. On the contrary, sub-s. 2 of this 66th section prescribes that "the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, *estimated* in the same manner as the total income from all sources is *estimated* for the purposes of exemptions or abatements under the Income Tax Acts." No distinction is here made as to the manner in which the income from different sources, assessed under the different schedules of the Act, is to be dealt with. The total is to be "estimated."

Sect. 72 of the Act of 1910 prescribes that the super-tax shall be assessed and charged by the Commissioners for the Special Purposes of the Acts relating to Income Tax, referred to as the Special Commissioners. It is upon them the duty is cast of "estimating" the taxpayer's total income. To aid them in this the taxpayer is required to make a return of his total income. That must, I think, mean what he, according to the best of his belief and judgment, considers his total income to be, and not

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what some persons other than those Special Commissioners may have already decided that it or any part of it, in fact, is. And if he fails to make this return or the Special Commissioners are not satisfied with any return he may make, then they are empowered to make an assessment of the super-tax, not, be it observed, according to what some other body or some other persons may have determined, but to the best of their own judgment.

In the case of a man whose business or profession is his sole source of income, it is obvious that if the contention of the appellants be right, the Special Commissioners would estimate nothing, make no assessment according to the best of their own judgment, but, without thought, investigation, or inquiry, merely adopt and register the conclusion of others.

Some reliance was placed on the provisions of s. 57, sub-s. 10, of the Taxes Management Act, 1880, to the effect that the decision on appeal of the Commissioners for General Purposes shall be final, and that neither their determination "nor the assessment then and there made thereupon shall be *altered at any subsequent meeting*, or at any time or place, except by order of the High Court when a case has been required as provided by that Act." [The italics are mine.]

This is by no means the only, or the earliest, provision as to the finality of such determinations and assessments, though perhaps it is the most explicit.

By s. 126 of the Income Tax Act of 1842 the decisions on appeal of the Commissioners for General Purposes in reference to Sched. D are made final and conclusive. So likewise, by s. 130, are the decisions of the Special Commissioners on the same matters when the appeal is made to them instead of to the former Commissioners.

When one turns to the special sections of the Act of 1842, dealing with the claims to exemptions, numbered 163—167 inclusive, one finds a system of procedure prescribed which takes no account whatever of the determinations and assessments declared by the earlier sections to be final and conclusive; on the contrary, they clearly indicate that a new inquiry and investigation into the merits of the claim is to take place

under the set of supplementary and special rules set forth in s. 164.

But the system of procedure thus prescribed is the very system which, according to the provisions of s. 66, sub-s. 2, of the Act of 1910, is to be followed in estimating the total income of the taxpayer for the purposes of the super-tax.

This s. 164 requires that the person claiming an exemption shall serve upon the assessor of his parish a notice of his claim, together with a declaration and statement in such form in effect as is by s. 190 directed, declaring and setting forth all the sources of his income, the particular amount arising from each source, any interest or payment charged thereon whereby the claimant's income would be diminished, and every sum which the claimant may have charged or be entitled to charge or to deduct or retain under the authority of the Act.

When Sched. G, referred to in s. 190, head XVII., is looked at, it will be found that the declaration must contain, amongst other things, a declaration of the amount of value or property or profits returned or for which the claimant has been, or is liable to be, assessed.

If the inspector or surveyor who is entitled to inspect and take copies of this declaration should not, within a time specified, object to it, the Commissioners may allow the claim, and if he should object to it on the ground that he has reason to believe that the income of the claimant, and the other particulars required by the Act to be declared or set forth, are not truly or fully declared or set forth in any specified particular, then the merits of the claim for exemption are to be heard and determined upon appeal before the Commissioners for General Purposes, under and subject to such rules and regulations and penalties as other appeals are under the Act heard and determined.

It would certainly appear to me that if the claimant should state and declare that he was extravagantly assessed under Sched. D, the Commissioners for General Purposes would wholly fail to discharge the duty imposed upon them if they merely accepted the assessment already fixed upon appeal under this latter schedule, and refused to permit any inquiry into its justice

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or correctness. That would not be a hearing and determination of the merits of the claimant's claim; and, in the case where the claimant's sole source of income was the profits of his trade, would be little less than a mockery.

In my view, therefore, the provisions as to the finality of the determination of the Commissioners for General Purposes, or of the Special Commissioners on appeal, contained in ss. 126 and 130 of the Act of 1842, as well as those contained in s. 57, sub-s. 10, of the Taxes Management Act of 1880, do not mean that the determinations respectively referred to are to be final and conclusive, not only in the particular matter on which they were actually pronounced, but in all other matters and for all other purposes.

Mr. Ryde, for the respondent, put it, correctly I think, in saying that s. 57, sub-s. 10, simply means that there shall be no further proceedings before the Commissioners in the particular matter of dispute or inquiry which is the subject of the appeal. I think the words in the sub-section, "and neither the determination of the Commissioners nor the assessment then and there made thereupon shall be altered at any subsequent meeting, or at any other time or place, except by order of the High Court," go to show this.

I am clearly of opinion, therefore, that the claimant was not estopped by statute from questioning, in these proceedings for the *estimation* of the super-tax to which it was sought to make him liable, the correctness of the antecedent determination as to the amount of the balance of the profits and gains of his business under Sched. D.

It was not suggested, as I understood, that he was estopped at common law. It may be very absurd or illogical that the amounts of these profits and gains should be inquired into for a second time. But this is a taxing statute and taxes cannot be imposed upon the subject under it unless in strict accordance with its provisions. The evil, if it be one, must be cured by legislation.

In my opinion, therefore, the decree appealed from was right and should be affirmed, and this appeal be dismissed with costs.

LORD PARKER OF WADDINGTON. (1) My Lords, I, too, am of opinion that this appeal fails.

The ordinary income tax for the year beginning April 6, 1909, is imposed by sub-s. 1 of the 65th section of the Finance (1909-10) Act, 1910, and sub-s. 2 of that section provides that all enactments relating to income tax in force on April 5, 1909, shall, subject to the provisions of the Act, have full force and effect with respect to any duties of income tax thereby granted.

The 66th section of the Act imposes an additional duty of income tax called a super-tax. It is chargeable for the year commencing April 6, 1909, in respect of the income of any individual the total of which from all sources exceeds 5000*l.* at the rate of 6*d.* for every pound of the amount by which the total income exceeds 3000*l.* The total income of any individual for the purposes of super-tax is to be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purpose of exemption or abatement under the Income Tax Acts.

If the Act had contained no further provisions, it can hardly be doubted that the authority responsible for estimating the total income of the individual, and assessing the duty thereon, would, by virtue of sub-s. 2 of the 65th section, have been the same as the authority responsible for the assessment of ordinary income tax, and that all the provisions of the Income Tax Acts relating to ordinary income tax would have been applicable to super-tax. But the Act does contain further provisions. It is provided by the 72nd section that the super-tax is to be assessed and charged in all cases by the Commissioners for the Special Purposes of the Acts relating to Income Tax. These Commissioners may serve a notice on any person requiring him to make a return of his total income, and every person so served is bound to make such return in the form required by the notice. If default is made in sending in such return, or if the Special Commissioners are dissatisfied therewith, they are to make an assessment according to the best of their judgment. Finally, all the provisions of the Income Tax Acts relating (inter alia) to assessments, appeals,

(1) Read by Lord Sumner.

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and cases stated for the opinion of the High Court are by s. 72, sub-s. 6, made applicable to assessments of super-tax, so that the party assessed may appeal against the assessment made by the Special Commissioners, and if he does so, any determination of the Special Commissioners on such appeal, and any assessment made thereupon, is by virtue of s. 57 of the Taxes Management Act, 1880, final and binding, except that a special case may be required on a point of law.

So far there can be no dispute, but it is contended on behalf of the Crown that s. 57 of the last mentioned Act has, by virtue of s. 65, sub-s. 2, and s. 96, sub-s. 4, of the Act of 1910, a further effect with regard to super-tax.

The argument on which this contention rests may be stated as follows: For super-tax purposes total income is to be estimated in the same way as total income is estimated for the purposes of exemption and abatement. This refers us back to ss. 163, 164, and 190 (Sched. G, XVII.) of the Act of 1842. If those sections be examined it will, it is said, be found that where a person claiming exemption or abatement has been assessed in respect of the profits and gains of a business on an amount determined by the assessing authority upon appeal for the purposes of Sched. D, he is bound to return, in respect of such gains and profits, the amount so determined, and the estimating authority is bound to accept such return, the determination being, under s. 57 of the Act of 1880, binding on all persons and for all purposes. Similarly it is said that where, for the purposes of Sched. D, the amount of profits and gains has been determined on appeal, this determination is binding for the purposes of super-tax, and neither the party assessed nor the Special Commissioners in estimating the total income can go behind such determination.

My Lords, I am far from being satisfied that the determination on appeal of the profits and gains of a business for the purposes of Sched. D is binding on the authority responsible for estimating total income for the purposes of exemption and abatement. Assuming, however, that it is so binding, it does not, in my opinion, follow that it is binding on the authority responsible for estimating total income for the purposes of super-tax. Total

income, for the purposes of exemption and abatement, may consist wholly of the gains and profits of a business, and if the amount of these profits and gains had already been determined on appeal for the purposes of Sched. D, the estimating authority would, on the assumption I am making, be precluded from themselves making an estimate at all, and be bound by an estimate made by another authority.

Similarly total income for super-tax purposes may consist wholly of the gains and profits of a business already determined on appeal for the purposes of Sched. D, and if the estimating authority be precluded from making an estimate, and similarly bound, it can only be by treating a statutory provision precluding an estimate in certain cases as part of the manner in which the estimate is to be made. I do not think that is a sound method of construction.

"Estimate" implies coming to a conclusion on the amount which has to be estimated after considering all the relevant facts. The Special Commissioners have to estimate total income for super-tax purposes. They are expressly told to estimate it in the same manner as another authority has to estimate total income for a different purpose. This must, I think, mean that they are to proceed as the other authority would have to proceed when making an estimate, and not as the other authority would proceed when precluded from making an estimate. I am therefore of opinion that the contention fails, nor do I think that the provisions of s. 65, sub-s. 2, and s. 96, sub-s. 4, of the Act of 1910 taken alone could be held to override the express provisions requiring the Special Commissioners to estimate the total income that is to determine the amount after considering the relevant facts.

It was further suggested that, on the general principles of law governing estoppels, neither the subject nor the Crown ought to be at liberty to go behind the amount of profits and gains when once determined by any competent authority. I do not dispute these general principles, but it seems to me that where there is a statutory provision requiring an estimate to be made for a statutory purpose and by a statutory authority, the principle of estoppel cannot be invoked to render the provision

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nugatory in cases where such principle might otherwise have applied.

The appeal in my opinion fails.

LORD SUMNER. My Lords, super-tax is "an additional duty of income tax," payable "in respect of the income of any individual the total of which from all sources exceeds" the prescribed sum, and "for the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts." The question on this appeal is whether the Commissioners for Special Purposes, sitting at Birmingham, when making this estimation for the purposes of super-tax for the year 1909-10, were bound to take that constituent of the respondent's income from all sources, which consisted of profits or gains from his trade, at the figure at which it had been taken by the Commissioners for General Purposes for the Division of Middleton, in Lancashire, when assessing him to income tax under Sched. D for the year ending April 5, 1909.

The answer depends entirely on the construction of the relevant sections of the Finance (1909-10) Act, 1910, and of the Acts incorporated with it, and it applies equally whether the General Commissioners were right or wrong, whether a patent mistake had been made in the facts or the exact truth had been discovered to several places of decimals, whether the conduct both of the taxpayer and the General Commissioners was impeccable, or whether misconduct of any kind was imputable to either or both of these parties.

Sect. 96, sub-s. 4, of the Finance (1909-10) Act, 1910, clearly incorporates with these enactments relating to super-tax many prior enactments, and particularly s. 57 of the Taxes Management Act, 1880. It is, however, purely an incorporating section, and the effect of that incorporation in this case is to be decided by reading and construing together ss. 163, 164, and 190 of the Income Tax Act, 1842, s. 57 of the Taxes

Management Act, 1880, and s. 66 of the Finance (1909-10) Act, 1910.

The case for the Crown involves two propositions. The first is that in estimating a subject's total income from all sources for the purpose of exemptions or abatements under the Income Tax Acts, as they stood prior to 1910, the General Commissioners would be bound to reject evidence of his actual profits or gains from his business and to adopt exclusively the figure at which they had been, in fact, taken for the purpose of assessing him to income tax under Sched. D.

The second is that the Commissioners for Special Purposes are equally so bound when estimating his total income from all sources for the previous year for the purpose of assessing him to super-tax.

Even assuming the first proposition to be true, the second is only established if either (*a*) the finality prescribed by s. 57, sub-s. 10, of the Taxes Management Act, 1880, leads to this result ; or (*b*), if the enacting part of s. 190 of the Income Tax Act, 1842, coupled with paragraph XVII. (1.) of the schedule to that section, substitutes the amount " for which the claimant hath been assessed," in cases where he has been assessed, for "the amount of value or property or profits returned."

My Lords, I am quite unable to see how s. 57 of the Taxes Management Act, 1880, can have this result. The section occurs in the part of the Act entitled " Assessment," and the tenor of the whole of its ten sub-sections shows that it is, what it is called in the heading, a section about " appeals." It prescribes the procedure which a person, aggrieved by an assessment upon him, is to follow before and at the hearing of his appeal by the General Commissioners. Then the last sub-section, No. 10, provides that, when the Commissioners have determined the appeal, their determination is final. Neither they nor any one else can reopen it, except under an order duly made by the High Court.

Such a provision is no doubt very beneficial. It was said during the argument that finality is of the essence of the scheme of the Income Tax Acts. My Lords, I cannot feel that this much assists the dry interpretation of the section. In an appeal

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against an assessment to income tax, as the Legislature imposed it before 1910, the litis contestatio comes to an end at a certain point. Let it be assumed that the finality so attained takes effect also in an application for exemption or abatement from income tax as so imposed. Why should it further take effect upon an initial estimation for the purpose of assessing another and a new tax—for super-tax is another and a new tax none the less, though it is an additional duty of income tax? I see nothing in s. 57 of the Taxes Management Act, 1880, sufficient to subject an original assessment to a new tax, to the special finality, which in terms is created for appeals from an assessment to an old tax. There are no express words to this effect in the Finance (1909-10) Act, 1910, and the bare incorporation of s. 57 of the Taxes Management Act, 1880, with Part IV. of the Act could not be held to have so extreme an effect, unless otherwise it would have no effect at all, which has not been and could not be contended.

Sect. 190 and r. XVII. of Sched. G of the Income Tax Act, 1842, seem to me inconclusive in themselves. I will assume, without deciding, that when there is an amount "for which the claimant hath been assessed," then it is so far "applicable to the case" of such person as to make it his duty to state it in his declaration in order to obtain exemption. Still, this is nothing but his statement. There is nothing to preclude him from also stating the amount of value or profits or property returned, so that both may come before the Commissioners. It is really s. 164 that determines the matter, for it prescribes the powers and duty of the Commissioners by requiring them to hear and determine the merits of such claim for exemption, which, pro tanto, is exactly what they would not be doing if, disregarding the evidence before them or rejecting the evidence tendered, they simply took a figure fixed on another occasion by other persons for a different though analogous purpose. The incorporation of this machinery into the super-tax part of the Finance (1909-10) Act, 1910, does not alter it or cause the provisions as to the form of the statement to be signed by the claimant to prevail over the provisions as to the determination of the claim by the Commissioners on the merits.

Again, the language of s. 66, sub-s. 2, of the Finance (1909-10) Act, 1910, is that for the purposes of super-tax the total income in question is to be the "total income . . . . estimated in the same manner" as in the case of a claim for exemption. To arrive at an arithmetical conclusion, consisting of an aggregate of various kinds of income, by taking the amount of one of those kinds of income from a figure fixed in another proceeding, is to go much beyond anything suggested by an "estimation" or by the "manner of estimating," and I do not think the argument that estimation of the total is consistent with accepting one item without estimation is sufficient, upon so obscure an enactment, to preclude the taxpayer from the right of proving the facts.

Finally, it was argued that, in the language of Phillimore L.J., "if the two parties to a controversy have had the matter in dispute finally determined between them by the ultimate tribunal, they ought not, nor ought either of them, to be allowed to reopen this dispute on any such ground as that the matter which has been decided subsequently becomes an item in another account, even though this other account has, in respect of its other items, or its casting, to be inquired into by a fresh tribunal."

With all respect, I think this begs the question; whether the "matter in dispute," or some other matter, has been previously determined, whether a reopening of the dispute is involved, or rather an estimation, according to the facts, are questions depending entirely on the construction of the Act. For the rest this argument is a mere argumentum ab inconvenienti, and is in itself insufficient to entitle the Crown to prevail.

I think that the appeal should be dismissed.

Lord Parmoor. My Lords, the respondent, John Hamer Brooks, who for several years has carried on the business of a waste dealer in Lancashire, was assessed under Sched. D by the Commissioners for General Purposes for the year ending April 5, 1909, at a sum of 6331*l.*, in respect of the profits arising from his business. On June 10, 1910, the Commissioners for the Special Purposes of the Income Tax Acts required the

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respondent to make a return of his total income from all sources for the purpose of assessment to super-tax for the year ending April 5, 1910. The respondent delivered a return in which he declared his income from his said business at 400*l.* The Special Commissioners were not satisfied with the return and made an assessment in respect of the profits arising from the said business at 6331*l.*, declining to take evidence, and holding that s. 66, sub-s. 2, of the Finance (1909-10) Act, 1910, rendered it obligatory on them to accept the sum of 6331*l.* as the respondent's income from his said business for the purpose of assessment to super-tax.

The question is whether this decision of the Special Commissioners is correct. Horridge J. held that the Special Commissioners were not bound by the assessment of the Commissioners for General Purposes, and this judgment was affirmed by the Court of Appeal, Phillimore L.J. dissenting.

Sect. 66 of the Finance (1909-10) Act, 1910, imposes an additional duty of income tax, referred to in the Act as a super-tax. For the purposes of this tax the total income of an individual from all sources is to be taken to be the total income of that individual from all sources for the previous year "estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts," subject to certain special conditions which do not apply in the present case. There is not only a statutory duty imposed on the Special Commissioners to estimate the amount of the total income, but the manner in which the estimate shall be made is obligatory by statute.

If the only duty placed upon the Special Commissioners had been to estimate the amount of the total income for the purpose of super-tax, in my opinion they would not have fulfilled this duty by declining to consider any evidence tendered by the subject, and adopting as conclusive the assessment of the Commissioners for General Purposes of the business profits under Sched. D at the sum of 6331*l.* This, however, is not the only duty of the Special Commissioners. They have not only to make an estimate, but to make it in a specified manner. The manner is found in s. 164 and s. 190 (Sched. G, No. XVII.) of the Income Tax Act, 1842.

These sections make it clear that the Special Commissioners should consider evidence properly tendered to them and make an independent estimate on their own authority after inquiry. I omit, at this stage, any reference to the argument founded on s. 57 of the Taxes Management Act, 1880, since, for the reasons hereinafter stated, that section does not, in my opinion, limit in any way the duties placed upon the Special Commissioners by s. 66 of the Finance (1909-10) Act, 1910.

Sect. 164 and s. 190 (Sched. G, No. XVII.) of the Income Tax Act, 1842, contain a full machinery for inquiry and estimate when a claim for exemption is made against the Crown, and enable the particulars of all the figures to be investigated on which the claimant relies in support of his claim for exemption. Sect. 164 enacts that, together with a signed declaration and statement, the claimant shall declare and set forth in his claim all the particular sources from whence his income arises, and the particular amount arising from each source. It would, therefore, be incumbent on the claimant, where a portion of his income was derived from profits of business, to declare and state the particular amount arising from such business. This declaration and statement every inspector or surveyor is at liberty to peruse or examine. If the inspector or surveyor does not object thereto, the Commissioners may allow such claim for exemption and discharge the assessment made upon any property or profits of the claimant. If the inspector or surveyor objects to any such claim in writing, and suggests that he has reason to believe that the income of such claimant, or any other particular required by this Act to be declared or set forth, is not truly or fully set forth in any specified particular, then the merits of such claim for exemption are heard and determined upon appeal before the Commissioners, under and subject to such rules, regulations, and penalties as other appeals under the Act are directed to be heard and determined. Thus, under s. 164, the Commissioners, in the case of a claim for exemption, have full power to inquire into the particulars on which the claim is based. They are further under an obligation, if the inspector or surveyor objects to the claim, to hear and determine the merits of the claim. The Special Commissioners for the purpose of super-tax are directed to estimate

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in the same manner as for the purpose of exemption or abatement, and cannot refuse to entertain evidence or to consider the merits in a case in which it is properly tendered for their consideration.

Sect. 190 (Sched. G, No. XVII.) points to the same conclusion. It does not direct a declaration of the assessment made for the purpose of income tax under Sched. D, but a declaration of the amount of value or property or profits returned, or for which the claimant has been or is liable to be assessed. In other words, whether the claimant has been assessed or not, he is required to make a declaration of profits returned, or for which he has been or is liable to be assessed, and on this information the Crown can claim full investigation.

The Attorney-General in his argument for the appellants relied on s. 57, sub-ss. 3 and 10, of the Taxes Management Act, 1880. It was contended that the effect of this section was to make the assessment of 6331*l.* by the General Commissioners under Sched. D conclusive for all purposes. If this is the effect of the section, then the Special Commissioners for super-tax would have no option. Their decision to accept this figure would be right, and they would properly have rejected the claim of the respondent to adduce evidence in support of his case.

I do not doubt that this section applies to the whole series of Income Tax Acts, including the Acts of 1842 and 1910, but this leaves open the question of its true meaning and construction. Sect. 57, sub-s. 3, gives a right of appeal to the General Commissioners, and s. 57, sub-s. 10, provides that the determination on the hearing of such appeal shall be final, and that such determination of the assessment shall not be altered at any subsequent meeting, or at any other time and place, except by order of the High Court. In the present case there has been no order of the High Court. The section does no more than make the determination of the General Commissioners final in the case which comes before them on appeal. It has no reference to the powers and duties of the Special Commissioners and in no way derogates from their obligation to estimate for the purpose of super-tax the total income from all sources in accordance with the statutory directions and requirements.

My Lords, the questions involved in this case are simply questions of statutory interpretation. In my opinion the appeal fails.

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Order of the Court of Appeal affirmed and appeal dismissed. The appellants to pay the costs in the Court of Appeal and of the appeal to this House.

Lords' Journals, December 1, 1914.

Solicitor for appellants: *H. Bertram Cox, Solicitor of Inland Revenue.*

Solicitors for respondent: *Rawle, Johnstone & Co., for J. Ogden Hardicker & Hanson, Manchester.*

[HOUSE OF LORDS.]

JUREIDINI . . . . . APPELLANT;

AND

NATIONAL BRITISH AND IRISH MILLERS INSURANCE COMPANY, LIMITED . . . RESPONDENTS.

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Fire Insurance—Policy—Arbitration Clause as to Amount of Claim—Condition Precedent to Action—Repudiation going to Root of Contract—Waiver.

A claim was made for indemnity for the loss of goods by fire under a policy the conditions of which provided (1.) that if the claim were fraudulent or if the loss were occasioned by the wilful act or with the connivance of the insured all benefit under the policy should be forfeited, and (2.) that if any difference arose as to the amount of any loss such difference should, independently of all other questions, be referred to arbitration, and that it should be a condition precedent to any right of action upon the policy that the award of the arbitrator or umpire of the amount of the loss if disputed should be first obtained. The insurance company repudiated the claim in toto on the ground of fraud and arson:—

Held, that the repudiation of the claim on a ground going to the root of the contract precluded the company from pleading the arbitration clause as a bar to an action to enforce the claim.

Scott v. *Avery* (1856) 5 H. L. C. 811 distinguished.

Decision of the Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal reversing a judgment of Darling J.

* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, and LORD PARMOOR.

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The appellant and Mitri Mahli, since deceased, carried on business as hardware merchants at Port Limon in the Republic of Costa Rica, and they had insured their stock in trade on the premises against loss by fire with the respondents and several other companies. The policies effected with the respondents contained the following conditions.

"XII. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this policy; or if the loss or damage be occasioned by the wilful act, or with the connivance of the insured; . . . . or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of condition XVII. of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited."

"XVII. If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required to do so in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator; and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or powers of the arbitrator, arbitrators or umpire respectively; and in the event of the death of an arbitrator or umpire another shall in each case be appointed in his stead by the party or arbitrators (as the case

may be) by whom the arbitrator or umpire so dying was appointed. The cost of the reference and the award shall be in the discretion of the arbitrator, arbitrators or umpire making the award. And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."

On April 20, 1910, the premises of the appellant's firm at Port Limon and the goods thereon were destroyed by fire.

Immediate notice of the loss was given by the firm to the respondents and the other offices with whom they were insured.

After a long correspondence with a view to settling the claim of the appellant's firm and proving the amount of the loss, on November 8, 1910, the agent of the appellant's firm in Manchester wrote to the respondents, who were acting on behalf of all the insurance companies, a letter in which he fixed the claim of the firm at 6250*l.*

The respondents' solicitors replied on November 18: "You are, of course, aware that your correspondents in Costa Rica were tried for arson in respect of the fire out of which this claim arises, and although upon appeal the judge held that the charge was not proven, we have been compelled to advise our clients that the circumstances are such that they ought not to admit the claim contained in your letter."

After some further correspondence the respondents' solicitors definitely informed the appellant's then solicitors that the letter of November 18 was to be taken as a total rejection of the claim.

Thereupon the claimants commenced actions against the several companies to enforce their claim, but all the actions except that against the respondents were stayed, the parties agreeing to be bound by the result of that action.

By their defence the respondents pleaded that the plaintiffs' claim was fraudulent, in that the amount claimed was grossly in excess of the value of the goods; that the plaintiffs set fire to their premises or connived at their being set on fire; and that the plaintiffs had not complied with condition XVII., and that it was a condition precedent to any right of action on the policy

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that an award of the amount of loss or damage if disputed should be first obtained.

The action was tried before Darling J. and a special jury. The jury found that the plaintiffs did not set fire to their premises or connive at their being set on fire, and that they did not make a fraudulent claim within condition XII., and they assessed the value of the goods at 3000*l.* Darling J. thereupon entered judgment for the plaintiffs for 543*l.* 2*s.* as being the proportion of the loss for which the respondents were responsible.

The respondents applied for judgment or a new trial on several grounds, and among others on the ground that the judge was wrong in law in holding that the action was maintainable having regard to the provisions of condition XVII.

The Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.) held that the action could not be maintained, on the ground that there had been no arbitration to assess the amount of damage.

The appeal to this House was originally opened in July last before a differently constituted House, but after some argument the hearing was adjourned indefinitely to enable the respondents to adduce further evidence.

1914. Dec. 14, 15. *Gordon Hewart, K.C.* (with him *Silvain Mayer, K.C., D. Owen Evans*, and *W. A. Barton*), for the appellant. The point was never reached at which it could be said that there was an effective dispute as to amount. The respondents repudiated the claim in toto on the ground of fraud and arson; therefore any inquiry as to damages would be futile. The respondents by agreeing to treat the action as a test action in respect of the matters in dispute between the insured and all the insurance companies concerned have waived any right they might otherwise have had under condition XVII. Further, if they had intended to rely upon that condition they ought to have applied for a stay of proceedings under s. 4 of the Arbitration Act, 1889, and they are now estopped from contending that arbitration under condition XVII. is a condition precedent to a right of action under the policies.

[He was stopped.]

J. B. Matthews, K.C. (*Holman Gregory, K.C.*, and *P. B. Durnford* with him), for the respondents. It is a term of the contract that no action shall be brought on the policy until the dispute as to the amount has been referred to arbitration. The clause expressly provides that the difference shall be referred "independently of all other questions." This is similar to the arbitration clause which was held to be pleadable in bar in *Scott* v. *Avery*. (1) Here there was a difference as to the amount before the repudiation, and there having been a difference it cannot be wiped out by a claim going to the root of the contract unless that difference has been adjusted.

[VISCOUNT HALDANE L.C. In *Municipal Council of Johannesburg* v. *D. Stewart & Co.* (1902) (2) Lord Shaw says: "It does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he has thus repudiated."]

In that case the arbitration clause was purely collateral: the award of the arbitrator was no part of the cause of action. Here the quantification of the amount is a condition precedent to any cause of action, and if under such a contract it is to be said that the clause does not apply where the insurance company sets up fraud or arson, is not that tearing up the contract? *Trainor* v. *Phœnix Fire Assurance Co.* (3) shows that this question is not affected by the fact that a charge of fraud is made against the assured. There is no conflict between conditions XII. and XVII. The respondents are not repudiating the contract but are asserting that the conditions of the contract give them a defence. Repudiation of a claim under the contract is not the same thing as repudiation of the contract. The respondents' repudiation is based on the stipulations of the contract itself. It is not open to the appellant at this stage of the proceedings to contend either that the condition has been waived or that no difference has arisen as to the amount. Both those are questions of fact for the jury, but neither of those questions was submitted to the jury. If the appellant intended to rely on either of those points he should have asked to have them left to the jury.

(1) 5 H. L. C. 811. (2) 1909 S. C. (H. L.) 53.
(3) (1891) 65 L. T. 825.

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VISCOUNT HALDANE L.C. My Lords, I believe your Lordships are unanimously of opinion that this case ought to be disposed of upon the preliminary point. Shortly described, the nature of the question was this: The appellants, who were plaintiffs in the action in the Court below, took out various policies of insurance with insurance companies, of whom the respondents were one, and it has been agreed that, as these policies were substantially in the same form, the present action should be taken as a test action and should dispose of the claims under them.

My Lords, the insurance was over property at Costa Rica, and the form of the policy was a policy over stock of textiles and hardware or other non-hazardous merchandise the property of the insured on the premises of a certain store at a certain place in Port Limon in Costa Rica; and the insurance under the particular policy sued on, the policy which was taken as a test case, was for 800*l*. Then there were certain conditions, and two of them are of importance. [His Lordship read conditions XII. and XVII.]

Now, my Lords, what happened was this. There was a loss occasioned by fire at Port Limon; the appellants made a claim under the policy and the respondents took up the ground that the loss was caused by the felonious acts of the appellants. They charged arson, and they said that the claim was a fraudulent claim. That was obviously a case which, if made out, went to the very root of the matter, because clause 12 of the policy which I have read says that if the claim was fraudulent or the damage was occasioned by any wilful act then all benefit under the policy is to be forfeited; and that attitude is again formally taken up by the respondents, because when the action was brought by the appellants on which this appeal arises the respondents in their defence took this ground, that they maintained that the appellants were not entitled to claim under the policy.

Now, my Lords, no doubt it is true that the policy contains an arbitration clause with a very stringent addition to it, to the effect that the going to arbitration is a condition precedent to the right to sue; and if that had been all,—if the action had been brought upon a policy containing such a clause and no more had happened,—then, on principle and on authority, the claim could not have been maintained without fulfilling the condition

precedent; because by the law of this country you can make most contracts which you desire, and, among others, a contract that you will not come under liability under a contract unless that liability is defined in a particular way, it may be by an arbitrator. *Scott* v. *Avery* (1) is a decision of this House to the effect that that is the law. But in *Scott* v. *Avery* (1) the action was brought upon a contract containing such a clause, and to the declaration a plea was put in raising this term of the contract: that the action could not be maintained because the plaintiff had contracted that he should have no cause of action unless there had been a previous arbitration. On that the plea was demurred to, and this House, after consulting the judges, who differed very much in opinion, ultimately decided that the demurrer was not a good demurrer, that the plea was a good one, and that the action could not be maintained. That was in effect a decision upon the demurrer. But the present case, as I have already pointed out, is different; there has been in the proceedings throughout a repudiation on the part of the respondents of their liability based upon charges of fraud and arson, the effect of which, if they are right, is that all benefit under the policy is forfeited. But one of the benefits is the right to go to arbitration under this contract, and to establish your claim in a way which may, to some people, seem preferable to proceeding in the Courts; and accordingly that is one of the things which the appellants have, according to the respondents, forfeited with every other benefit under the contract.

Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced. As I have said, this is not like the case of *Scott* v. *Avery* (1); it is a case under which the consequences with which we are dealing arise from the established fact of repudiation. When the case went to trial it was heard before Darling J. and a special jury, and the jury found that the case of fraud and arson had broken down; they found for the plaintiffs upon those issues, and the learned judge gave judgment, not that the case should go to

(1) 5 H. L. C. 811.

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arbitration, but for 3000*l.*; and I think that was probably right, the arbitration clause having gone with the repudiation. The respondents appealed to the Court of Appeal on two grounds: first that the arbitration clause was a bar to the action, and secondly for a new trial on the ground that the verdict was against the weight of evidence, and also on the ground that there was further evidence which ought to be taken into account. The second ground was sought to be made good on a notice of motion, which, I gather, was out of time, but which, under special circumstances, it was hoped that the Court of Appeal would none the less give leave to entertain.

My Lords, the Court of Appeal has never disposed of the motion for a new trial on either of the grounds which I have indicated; it has only disposed of the case on the footing that the arbitration clause is a bar, a conclusion which, for the reasons I have already assigned, I am unable to concur in. I am therefore of opinion that the judgment of the Court below must be reversed and that this case should go back to be disposed of by the Court of Appeal on the motion for a new trial; and I think that the most convenient form in which to put our judgment will be this: to reverse the order which set aside the judgment of Darling J., without prejudice to any application that the respondents may make to the Court of Appeal with a view to restoring and disposing of the notice of appeal which relates to the new trial; that any possible proceedings under Darling J.'s judgment should be stayed for a month with a view to such application; and also that the respondents should pay the costs here and, I think, in the Court of Appeal also.

My Lords, I move accordingly.

LORD DUNEDIN. My Lords, I concur. I certainly have not the slightest idea that in pronouncing the judgment we are about to give we are in the faintest way throwing any doubt upon the decision of this House in *Scott* v. *Avery*. (1) That decision of *Scott* v. *Avery* (1) was again upheld by this House in the more recent case of *Caledonian Insurance Co.* v. *Gilmour* (2), where the Lord Chancellor (Lord Herschell) puts the matter in a single

(1) 5 H. L. C. 811. (2) [1893] A. C. 85, at p. 90.

sentence when he says that the question is "whether where the only obligation created is to pay a sum ascertained in a particular manner, where, in other words, such ascertainment is made a condition precedent to the obligation to pay, the Courts can enforce an obligation without reference to such ascertainment." Personally I should rather like to reserve my opinion as to what would have been the effect if the respondents, instead of pleading as they did, had pled in this way: "We will allow this question to be disposed of at law by a jury as to whether there was fraud and arson or not," and had gone on to say, "but in the event of that being negatived we wish this ascertainment of actual damage to be ascertained by arbitration." I should like to reserve my opinion on whether they might have said so with effect.

My Lords, the very clear argument of Mr. Matthews tried to make out that if he once showed that at a certain time in Costa Rica a certain difference had arisen, then that brought into full operation and effect the condition precedent in clause 17 as applicable to all suits. My Lords, I do not think that view can be maintained, because clause 17 provides for the case of a difference arising as to the amount of loss, and then says that it shall be a condition precedent to any right of action or suit on the policy that the award of such arbitrator, and so on, of the amount of loss or damage, if disputed, shall be first obtained. I think it is perfectly clear that that article necessarily refers to an existing difference, not an historical difference; and it seems to me that when the attitude was taken up by these parties, which was taken up in the letters which have been read to us which the Lord Chancellor has referred to, in England,—that they repudiated the claim altogether and said that there was no liability under the policy,—that necessarily cut out the effect of clause 17 as creating a condition precedent against all forms of action. I therefore concur in the motion which has been made by my noble and learned friend on the woolsack.

LORD ATKINSON. My Lords, I concur on this short ground. I think that article 17 refers to existing disputes and differences about the amount of loss sustained, and in a contract such as this I do not think that article has any application whatever when the

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persons to indemnify say "You yourself brought about the destruction of the goods which were insured for the loss of which you claim to be indemnified, and we rely upon an article which provides that in that state of circumstances all benefit under the policy is forfeited." I therefore think the order should be made which has already been suggested by my noble and learned friend on the woolsack.

LORD PARKER OF WADDINGTON. My Lords, I concur.

LORD PARMOOR. My Lords, I concur. The respondents raised an issue on which, if they had succeeded, the appellant would have forfeited all benefit under the policy, including the benefit that would have been derived under clause 17 of the policy. At the same time I should like to express my opinion that no difference had arisen as regards matters which could come for decision under clause 17, and that consequently the clause had no application.

Order of the Court of Appeal reversed and judgment of Darling J. restored without prejudice to any application which may be made to the Court of Appeal with a view to restoring and disposing of the notice of appeal so far as concerns the other grounds not entertained on the previous occasion, and any possible proceedings under the judgment of Darling J. to be stayed for one month with a view to such application being made. The respondents to pay the costs in the Court of Appeal and also the costs of the appeal to this House.

Lords' Journals, December 15, 1914.

Solicitors for appellant: *Fielder, Jones & Harrison, for C. T. Rhodes & Son, Halifax.*

Solicitors for respondents: *Andrews, Ogilvie & Fisher.*

[HOUSE OF LORDS.]

COMMISSIONERS OF INLAND REVENUE Appellants; H. L. (Sc.)*

AND 1914

WALKER . . . . . Respondent. *Dec.* 3

Revenue—Increment Value Duty—Site Value on Occasion of Sale—Method of Ascertainment—"Like Deductions"—Deduction in respect of Goodwill and Matters personal to Parties—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 2, *sub-s.* 2; *s.* 25, *sub-s.* 4 (*a*) *and* (*d*).

In June, 1911, the owner of a freehold house sold it, subject to feu duty of the capitalized value of 5*l.*, for 650*l.* to a tenant who for many years had occupied the house as a draper's shop and dwelling-house. On an appeal by the owner to a referee against an assessment under s. 2 of the Finance (1909-10) Act, 1910, to increment value duty on the occasion of the sale the referee found that the estimated gross value of the house was 475*l.* and the full site value 75*l.* He also found that 180*l.* of the purchase-money was paid by the purchaser to avoid being disturbed in his tenancy and held that it fell to be deducted from the consideration under s. 25, sub-s. 4 (*d*), of the Act as having been paid in respect of goodwill or other matter personal to him as occupier; and deducting 400*l.* (475*l.* — 75*l.*) as the value of the buildings and the 180*l.* above mentioned from the consideration he fixed the site value on the occasion at 70*l.*:—

Held, (1.), on the authority of *Lumsden* v. *Inland Revenue Commissioners* [1914] A. C. 877, that in making the deductions from the consideration for the purpose of ascertaining the site value on the occasion of a sale the gross value and total value as well as the full site value fell to be determined by a process of valuation, and that the site value on the occasion (arrived at by deducting from the consideration, 650*l.*, the difference between the gross value, 475*l.*, and the divested value, 75*l.*) was 250*l.*; (2.) that the deduction of 180*l.* from the consideration was not permissible, first, because on the facts there was no evidence to support the finding of the referee on this point, and, secondly, because the sum in question formed no part of the total value to which alone the deductions authorized by s. 25, sub-s. 4 (*d*), related.

Decision of the Court of Session in Scotland, 1913 S. C. 719, reversed.

Appeal from an interlocutor of the judges of the Court of Session in Scotland named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts (1), and an incidental

* *Present:* Earl Loreburn, Lord Atkinson, Lord Parker of Waddington, Lord Sumner, and Lord Parmoor.

(1) 1913 S. C. 719.

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interlocutor of the Lord Ordinary as to expenses, upon a stated case under the provisions of the Finance (1909-10) Act, 1910.

The respondent appealed to a referee from an assessment by the Commissioners of Inland Revenue dated April 29, 1912, to increment value duty of 49*l.* in respect of the sale by her of a property in the town of Dalry, Ayrshire.

The appeal raised a question as to the correct mode of ascertaining the site value of the property on the occasion of the sale.

The material sections of the Finance (1909-10) Act, 1910, are set out in a note to the report of the case of *Lumsden* v. *Inland Revenue Commissioners* (1), which raised a similar question. The facts found by the referee were as follows.

1. John Walker, the husband of the respondent, died on January 10, 1911, he being at that date possessed of the property above referred to, which was burdened with a feu duty of 5*s.*

2. On March 6, 1911, the value of the property was returned for estate duty purposes by or on behalf of the respondent as executrix of John Walker at 400*l.*, and on August 9, 1911, that value was accepted by the Inland Revenue district valuer on the understanding that it should form the basis of the different values under the Finance (1909-10) Act, 1910.

3. No increment value duty was claimed by the Commissioners of Inland Revenue on the occasion of the death of John Walker.

4. The provisional valuation, as at April 30, 1909, under the Act was served upon the respondent or her solicitors on August 30, 1911, the details thereof being:

Original gross value	£405
Deductions from gross value—	
(*a*) Difference between gross value and value of the fee simple of the land divested of buildings, trees, &c.	380
(*b*) Feu duty, ground annual, or tack duty .	5
Original full site value	25
Original total value	400
Original assessable site value	20

(1) [1914] A. C. 877.

5. No appeal was intimated against the provisional valuation, which had accordingly become final.

6. By disposition dated June 3 and 8 and recorded June 9, 1911, the property was sold by the respondent to James Burns Walker, her brother-in-law, and his wife.

7. The consideration payable to the respondent for the transfer was 650*l.*

8. The Inland Revenue district valuer stated that, when he agreed on August 9, 1911, to accept a value of 400*l.* as the value of the property for estate duty purposes, he was not aware that it had been transferred on June 8, 1911, for the consideration of 650*l.*

9. No works had been executed or capital expenditure made upon the property during the period from April 30, 1909 (the date as at which the provisional valuation was made), and June 8, 1911 (the date of the transfer above mentioned).

10. By an assessment dated April 29, 1912, the site value, on the occasion of the transfer, had been determined by the Commissioners of Inland Revenue at 270*l.*, and the Commissioners had accordingly fixed the increment value on the occasion at 250*l.*, being the amount by which the site value on the occasion exceeded the original site value fixed by the provisional valuation; and increment value duty had been claimed from the respondent on that sum.

The referee was of opinion that on June 8, 1911, the date of the occasion above mentioned, the fee simple of the property, if sold in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes), might have been expected to realize 475*l.*, and that the fee simple of the land, if sold at the time under the above conditions but divested of buildings, trees, &c., might have been expected to realize 75*l.*; and that, subject to the burden of the feu duty already mentioned, it might have been expected to realize 70*l.*

It was contended on behalf of the respondent:

(*a*) That there had been no increase in the value of the site within the meaning of s. 2 of the Act between April 30, 1909, and June 8, 1911; and that the Commissioners of Inland

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Revenue having agreed to accept 400*l.* as the basis of the different values under the Act, as stated in paragraph 2, the site value on that basis was 20*l.* at both dates.

(*b*) Alternatively, that the consideration of 650*l.* paid for the property by James Burns Walker was greatly in excess of its value in the open market at June 8, 1911; that in paying that price he was actuated partly by sentiment, partly by family affection towards his brother's widow, and partly by a dread that, if the subjects were acquired by an outsider, he might be compelled to quit the premises he had long occupied in the property, namely, his shop in which he carried on business as a draper, and his dwelling-house; and that, on a sound construction of the Act, and particularly s. 25, sub-s. 4 (*d*), a deduction fell to be made from the consideration paid on the transfer to him in respect of goodwill or other matter personal to him as occupier of part of the property.

It was contended on behalf of the Commissioners of Inland Revenue:

(*a*) That in fixing the increment value on the occasion of the transfer of the property to James Burns Walker, the site value, on a sound construction of s. 2, sub-s. 2 (*a*), of the Act, must be taken to be the value of the consideration for the transfer, subject to the like deduction—in this case the same deduction, as there had been no capital expenditure made upon the property—as was made in the provisional valuation for the purpose of arriving at the site value from the total value; and that, in arriving at the site value on the occasion as stated in paragraph 10, the directions in s. 2, sub-s. 2 (*a*), had been duly followed.

(*b*) That, on a sound construction of s. 12 of the Act, it was not competent for the respondent, on the occasion of the said transfer, to claim any deduction for goodwill or other matter personal to James Burns Walker, no such deduction having been claimed when the original site value was fixed.

The referee decided that contention (*a*) of the respondent was not a question of law but a question of fact, and that the site value of the land on the occasion of the transfer on June 8, 1911, was 70*l.*

If the Court determined that he was wrong in deciding that

contention (*a*) of the respondent was a question of fact, and that it formed a sound contention in law, he decided that the site value of the land on the occasion was 20*l*.

If the Court determined that contention (*b*) of the respondent was correct, he decided that the site value of the land on the occasion was 70*l*.

If the Court determined that either contention of the Commissioners of Inland Revenue was correct, he decided that the site value of the land on the occasion was 270*l*.

The Commissioners having appealed to the judges of the Court of Session named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Act, their Lordships remitted the case to the referee for a further statement.

In obedience to this interlocutor the referee reported that in regard to contention (*a*) of the respondent he was of opinion—1st. That as matter of fact the Commissioners of Inland Revenue did agree to accept 400*l*. as the basis of the different values under the Act, as stated in paragraph 2; this opinion being founded on the correspondence between the district valuer and the respondent's solicitors. 2nd. That as matter of fact there had, on the hypothesis that the original site value was a fair one, been no increase in the value of the site between April 30, 1909, and June 8, 1911. But, for the reasons after given, he had come to the conclusion that the values in the provisional valuation were all too low.

In regard to contention (*b*) of the respondent he explained that he had considerable difficulty in coming to a decision on that point. He would have liked to get from James Burns Walker personally a statement of the motives by which he was actuated in paying the consideration of 650*l*. for the property; but on the date when he inspected the property and heard parties on the appeal, June 28, 1912, Mr. Walker was very seriously ill, and in fact he died on July 14, 1912. For this reason he was unable to get from him any statement as to what was in his mind when he purchased the property, and as far as he could learn from the parties there was no other person to give him any information on that point. He had, therefore, had to form his conclusions on the matter as best he could. After full consideration, he was

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satisfied as matter of fact that in paying the purchase price of 650*l.* James Burns Walker was actuated by some one or other of the considerations alleged in contention (*b*) of the respondent. Further, he was of opinion that in law the facts warranted a deduction in respect of some such personal element from the purchase price, under s. 25, sub-s. 4 (*d*), of the statute. Further, he considered, assuming such a deduction competent in law, that the sum of 180*l.* should be allowed in respect thereof. For the reasons stated above, he was not able to arrive directly at the sum just mentioned; he could only arrive at it by ascertaining to the best of his ability the market value of the subjects, and then taking the difference between that and the consideration on sale as necessarily the proportion of the consideration on sale given for the personal element, the figures of the calculation being—

Consideration on sale	£650 0 0
Less market value of property at June 8, 1911, estimated by him at . .	470 0 0
Leaving	£180 0 0

as the proportion of the consideration on sale given for the personal element.

If the Court should decide that the deduction claimed could not competently be allowed under the statute, and that the purchase price of 650*l.* must be accepted as the occasional total value, without deduction in respect of any personal consideration, then, on that alternative hypothesis, he was of opinion that, of the sum of 650*l.*, the sum of 552*l.* represented the value of the buildings or other appurtenants to the site, and the sum of 98*l.* represented the value of the site. Or to put this in another way—

Accepting the consideration on sale as the occasional total value	£650 0 0
Whereas the total value in the provisional valuation was	400 0 0
Shows a rise in value between April 30, 1909, and June 8, 1911, of . . .	£250 0 0

Of this, the amount attributable to a rise in the value of the buildings is 552*l.* less 380*l.*, the amount allowed for buildings in the provisional valuation . .	£172	0	0
And the amount attributable to a rise in the value of the site is 98*l.* less 20*l.*, the original site value in the provisional valuation	78	0	0
	£250	0	0

In regard to contention (*a*) of the Inland Revenue Commissioners, the referee stated his opinion that the Commissioners were wrong in contending that the words "the like deduction" were in every case synonymous with the words "the same deduction."

In regard to contention (*b*) of the Commissioners, he was of opinion that s. 12 of the statute did not render incompetent the deduction claimed for goodwill or other matter personal to James Burns Walker. And that for this reason: a deduction for matter personal to James Burns Walker, the purchaser of the property on June 8, 1911, could obviously not have been claimed by the respondent in the particulars which she was called upon to furnish to the Commissioners for the original valuation as at April 30, 1909. The only person who could claim such a deduction was James Burns Walker, and he could not claim it until he became owner of the subjects.

Following the directions of the statute, he arrived at the following conclusion as to the assessable site value on the occasion of the sale to James Burns Walker:—

Consideration on sale	£650	0	0
Deduct—			
Under s. 25, sub-s. 4 (*a*), "the same amount as is to be deducted for the purpose of arriving at full site value from gross value"	£552	0	0

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Under s. 25, sub-s. 4 (*b*), (*c*), and (*e*), no deductions were claimed by the respondent, so he allowed none	nil	£552	0 0
Result—Assessable site value		£98	0 0

He then stated how his estimate of 470*l.* as the market value of the property at June 8, 1911, was made up.

The rental at that date was 38*l.*, and this he capitalized at twelve and a half years' purchase		£475	0 0
(which is the figure corresponding to gross value in the valuation)			
Deducting the capitalized value of the feu duty of 5*s.* at twenty years' purchase .		5	0 0
Gives as the market value . . .		470	0 0
(corresponding to total value in the provisional valuation)			
Deducting from this the difference between gross value and value of the fee simple of the land divested of buildings, trees, &c., which difference he estimated at .		400	0 0
(as against 380*l.* in the provisional valuation)			
Leaves as the market value of the site .		£70	0 0
(this corresponding to assessable site value in the provisional valuation)			

The referee then said that speaking generally he did not think there had been any material alteration in the value of properties in Dalry between April 30, 1909, and June 8, 1911, and that it followed from the figures given above that the various values in the provisional valuation were underestimated, and he gave his reasons for that conclusion.

Of course the provisional valuation had now become final, but he was bound to criticize it in order to make his own conclusions clear.

Finally, he explained how the findings which he gave in the stated case were arrived at.

His first or principal finding, fixing the site value on the occasion at 70*l.*, was his estimate of the market value of the site on the occasion.

His second finding, fixing the site value on the occasion at 20*l.*, needed no explanation.

His third finding, fixing the site value on the occasion at 70*l.*, was arrived at by taking the consideration on sale £650 0 0
and deducting for buildings . . £400 0 0
and for matter personal to James Burns Walker 180 0 0
580 0 0
Leaving as site value on the occasion . . . £70 0 0

His last finding, fixing the site value on the occasion at 270*l.*, was arrived at by taking the consideration on sale £650 0 0
and deducting for buildings the same amount as in the provisional valuation 380 0 0
Leaving as site value on the occasion . . £270 0 0

Upon these further findings the Court by a majority (Lord Johnston and Lord Salvesen, Lord Cullen dissenting) affirmed the determination of the referee upon point (*b*). Lord Johnston and Lord Salvesen also expressed the opinion that the consideration on the occasion of a sale was to be taken as the market value of the property, but they preferred to rest their judgment upon the alternative ground taken by the referee.

1914. Oct. 26, 27. *Sir John Simon, K.C., Attorney-General for England*, and *T. B. Morison, K.C., Solicitor-General*

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for Scotland (with them *R. Candlish Henderson*, of the Scottish Bar), for the appellants. The main point raised by the respondent in her appeal to the referee is concluded by the decision of this House in *Lumsden* v. *Inland Revenue Commissioners*. (1) Her second point depends upon s. 25, sub-s. 4 (*d*), of the Finance Act of 1910, which allows as a deduction from the total value for the purpose of arriving at the assessable site value any part of the total value which is proved to the Commissioners to be directly attributable "to goodwill or any other matter which is personal to the owner, occupier, or other person for the time being interested in the land," and a deduction of 180*l.* is claimed under this head. But (1.), whatever may be the meaning of the words of that clause, they refer to something which is part of the total value, and no part of the deduction here claimed has been included in the total value; (2.) the words "goodwill &c." do not apply, for it is the seller who has to pay the duty, and considerations personal to the purchaser have no relevance to this question; (3.) the referee had not before him any materials for measuring this deduction; (4.) s. 12 of the Act in terms prohibits the respondent from claiming the deduction at this stage inasmuch as the goodwill was palpably capable of deduction on the provisional valuation. The referee's view appears to be that this money is to be deducted not because it forms part of the total value but because it does not. This second point also is really concluded by *Lumsden's Case*. (1)

Roberton Christie, *K.C.*, and *King Murray* (both of the Scottish Bar), for the respondent. *Lumsden* v. *Inland Revenue Commissioners* (1) does not affect the second branch of the respondent's case. Upon a sound construction of the statute any part of the purchase price attributable to matters personal to the owner, occupier, or other person for the time being interested in the land—and here the purchaser was the occupier—falls to be deducted in estimating the occasional site value, and in this case the price was in fact increased to the extent of 180*l.* by reason of such matters. The report of the referee shows that he has separated the element of price given to avoid disturbance and has taken it out of the transfer. In that he was wrong, but the same

(1) [1914] A. C. 877.

result would have been obtained if he had added the 180*l.* to the market value as he should have done.

Sir John Simon, A.-G., replied.

The House took time for consideration.

Dec. 3. EARL LOREBURN. My Lords, I regard this case as concluded by the decision of this House in the *Lumsden Case.* (1) In view of the opinions of your Lordships, which I have had the advantage of reading in print and in which I concur, it is not necessary for me to enter upon the consideration of this complicated Act, for all that I have to say is better expressed in those opinions. I understand that the question of costs is settled between the parties.

LORD ATKINSON. My Lords, as the authorities must now be taken to stand I think the present is a perfectly plain case. The consideration for the sale of this property, the increment value of which is to be determined with a view to its taxation, is 650*l.*

The market value of that same property, within the meaning of the 25th section of the Finance Act of 1910, was fixed by Mr. Binnie, the referee, at 475*l.*, the total value at 470*l.* The main question for decision is which of these two sums—the purchase price or the estimated market value, i.e., the sum which in the open market would on sale, presumably, be paid for it by a willing purchaser—is to be taken as its gross value within the meaning of the above-mentioned section.

It must now be assumed that according to the decision of this House in *Lumsden* v. *Commissioners of Inland Revenue* (1) the estimated value, 475*l.*, and not the purchase price, 650*l.*, is to be so taken. Though the noble Lords who heard that case were divided in opinion equally, the opinion of those who voted in the negative on the question being put, that the judgment appealed from be reversed, must be taken to be the decision of the House: *Beamish* v. *Beamish.* (2) Well, if that be so, then so far as the first point relied upon by the respondent is concerned, the

(1) [1914] A. C. 877. (2) (1861) 9 H. L. C. 274.

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contention of the Crown must prevail, and the occasional site value be fixed at 250*l.*, the increment value at 230*l.*

These figures are set out at p. 24 of the case stated, and so far as they go cannot, subject to the second point raised, be questioned.

This second point is this. Sect. 25, sub-s. 4 (*d*), directs that any part of the total value of land attributable to "goodwill or any other matter which is personal to the owner, or occupier, or other person interested for the time being in the land" is to be taken into account in estimating the total value.

It was urged that the purchaser in this case, who happened to carry on the business of a draper in a shop forming portion of the premises, either from his aversion to be disturbed, or from his being attached to the premises, paid for them a sum of 180*l.* in excess of their market value, as estimated, and that this sum should be deducted from the total value, 470*l.*

It is a sufficient answer to this contention to say that the point does not arise on the facts of the case. The supplemental statements of Mr. Binnie, the referee, to be found at p. 16 of the special case stated, cannot, in my view, with any regard to the ordinary meaning of language, be styled findings of fact. He says he was unable to get any statement from the purchaser as to what was in his mind when he purchased the property, and that no other person could give him that information. He then proceeds: "I have, therefore, had to form my conclusions on the matter as best I could. After full consideration, I am satisfied as matter of fact that in paying the purchase price of 650*l.*, James Burns Walker was actuated by some one or other of the considerations alleged in contention (*b*) of the original appellant. Further, I am of opinion that in law the facts warrant a deduction in respect of some such personal element from the purchase price, under s. 25 (4.) (*d*) of the statute. Further, I consider, assuming such a deduction competent in law, that the sum of 180*l.* should be allowed in respect thereof. *For the reasons stated above, I was not able to arrive directly at the sum just mentioned; I could only arrive at it by ascertaining to the best of my ability the market value of the subjects, and then taking the difference between this and the consideration on sale as necessarily the proportion of*

the consideration on sale given for the personal element, the figures of the calculation being ——" [The italics are mine.] That amounts simply to this, that he surmises that the purchaser gave 180*l.* more than his own estimate for the property for some such reason as is mentioned, but save by that surmise he cannot state the amount due to those undisclosed motives. That does not amount to a finding that any portion of the total value, or of any other value, is directly attributable to "the goodwill or other matter personal to his occupation of portion of the property."

The whole of the gallant effort (on the part of his client) of the learned counsel who appeared for the respondent consisted in reality in an attempt to show that the gross value and the purchase price were convertible terms. But that is precisely what this House has decided cannot be done.

In my opinion, therefore, the contention of the Crown is clearly right. The judgment of the special tribunal before which the case came was erroneous, and this appeal should be allowed; but having regard to the fact that the case was decided in Scotland before the case of *Lumsden* v. *Commissioners of Inland Revenue* (1) had been decided in this House, I think the Crown should pay the respondent's costs of this appeal when taxed and ascertained, and that each party should abide his or her costs before the referee and in the Court below.

Lord Parker of Waddington. (2) My Lords, it is quite clear that occasional site value on a sale of land is, by virtue of s. 2, sub-s. 2 (*a*), of the Finance (1909-10) Act, 1910, the consideration for the sale—subject to the like deductions as are made under s. 25, sub-s. 4, in arriving at original or assessable site value.

The first of these deductions is the difference between gross value and full site value. It was held in the case of *Lumsden* v. *Commissioners of Inland Revenue* (1) that for the purpose of ascertaining the amount of this deduction the gross value as well as the full site value on the occasion of the transfer must be determined by a process of valuation, and that it would be wrong to take the gross value as the consideration for the sale plus the

(1) [1914] A. C. 877. (2) Read by Lord Parmoor.

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Lord Parker of Waddington.

capitalized value of the burdens subject to which the land was sold; and similarly that, for the purpose of ascertaining the amount of the second, third, and fourth deductions, the total value must be ascertained by valuation, and cannot be taken as the consideration for the sale.

This decision is one of far-reaching importance. It converts the increment value duty imposed by the Act into a duty which is wholly independent of any increment value at all, and it enables the Crown on any sale of land to exact as increment value duty one-fifth of the sum by which the actual consideration given by the purchaser may in the opinion of the valuing authority have been too large—even though the original or assessable site value may have remained the same or have actually decreased.

Under these circumstances I can only regard it as unfortunate that the case fell to be determined on the principle that where your Lordships are equally divided in opinion the decision of the Court below must be affirmed, more especially as I find it difficult to reconcile the decision with that view of the Act which was unanimously adopted by this House in *Herbert's Trustees* v. *Commissioners of Inland Revenue*. (1) It is, however, well settled that a case decided on the principle to which I have referred is as binding upon this House as a decision pronounced nemine contradicente,—*Attorney-General* v. *Dean of Windsor* (2)—so that the present respondent is precluded from reopening the question, although had this appeal been heard first there might well have been a binding decision the other way.

It follows that, the gross value of the land in the present case having been determined by the referee at 475*l*. notwithstanding the consideration of the sale was 650*l*., and the full site value having been determined at 75*l*., the amount to be deducted from the 650*l*. by virtue of s. 25, sub-s. 4 (*a*), is 400*l*. only. And it equally follows that the respondent can make no further deduction from the 650*l*. under s. 25, sub-s. 4 (*d*), unless she can prove that some part of the total value of the land, as estimated by the referee, namely, 470*l*., is directly attributable to one or other of the matters referred to in clause (*d*). It being quite clear that no part of

(1) [1913] A. C. 326. (2) (1860) 8 H. L. C. 369.

this 470*l.* is so attributable, the respondent is precluded from claiming any deduction under this head.

It was suggested by the respondent that on a true reading of the findings of the referee he did in reality estimate the total value of the land sold at 650*l.* and not 470*l.*, and the gross value at 655*l.* and not 475*l.* I find it impossible so to read these findings, nor do I think that any argument based on a contention that under the circumstances of the land having actually realized 650*l.*, the referee could not find the total value at less than 650*l.*, could be accepted without wholly disregarding the decision in *Lumsden* v. *Commissioners of Inland Revenue.* (1)

In my opinion, therefore, the appeal must succeed. The Crown has agreed to pay the respondent's costs of the appeal, and under the peculiar circumstances of the case I think that your Lordships should direct each party to bear his own costs of the proceedings before the referee and in the Courts below.

LORD SUMNER. My Lords, upon the facts found in this case the main question is clearly the same as that raised in the case of *Lumsden* (1), and is concluded by your Lordships' decision upon that occasion.

Further, to my mind, the facts do not raise the respondent's contention that something should be deducted from the total value "for goodwill or any other matter which is personal to the owner, occupier, or other person interested for the time being in the land." Such a deduction is only warranted in respect of "any part of the total value, which is proved to the Commissioners to be directly attributable" to such matters, and, as I read it, the case stated admits frankly that no proof was obtainable upon the point, and that the conclusion upon it in favour of the respondent was only a plausible speculation as to the purchaser's motives.

I think that the Crown is entitled to succeed on this appeal.

LORD PARMOOR. My Lords, the main point in this case, the method of ascertainment of site value on the occasion of a transfer, is not open to argument after the decision of this House in

(1) [1914] A. C. 877.

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the case of *Lumsden* v. *Commissioners of Inland Revenue*. (1) The result of the decision in that case was in part to levy increment value duty on builders' profits. In the present case the referee found, so far as it was a question of fact, that the site value of the land on the occasion was 70*l*. The effect, however, of the *Lumsden* decision is to include in the valuation of site value, and to subject to increment value duty, a sum of 180*l*., paid partly by family affection towards a brother's widow, and partly by fear, that, if the property was acquired by an outsider, the occupier might be compelled to quit the premises he had long occupied, and in which he carried on business as a draper.

My Lords, I expressed an opinion in the *Lumsden Case* (1) that the relevant sections of the Finance Act, 1910, if properly construed, did eliminate from the site value on the occasion of a transfer all the factors which had not entered into the calculations of the original site value, in which case the increment value duty would be levied on an increment in value of the same interest between the two dates, but it would be of no purpose to repeat the reasons on which that opinion was based. The counsel for the respondent very properly admitted that he was precluded from questioning the decision in the *Lumsden Case* (1), and raised three points which he argued that decision did not cover.

The first point was that by arrangement the Inland Revenue authorities had agreed to accept certain figures as the basis of valuation and that they could not now be heard to put forward different figures. I can find no evidence of any such arrangement in the correspondence to which the attention of the House was directed.

Secondly, it was argued that the valuation of the referee was not properly made, in that he excluded from consideration the actual transaction of June 8, 1911. I think it is clear from the statement of the referee that he did not exclude from his consideration the sum of 650*l*. paid as the consideration for transfer on June 8, 1911, but held that for special reasons this sum was in excess of the market value. It is difficult to think that any referee would refuse to regard, as relevant evidence, the actual sum paid on a recent sale of the land which he is called upon to

(1) [1914] A. C. 877.

value. It is a very different matter to say that the referee is bound to accept the amount of the consideration as the market value, and unless the argument for the respondent is carried to this length, it fails to show that there is any ground for the suggestion that the referee neglected any relevant consideration in fixing the market value.

In the third place, it was urged on behalf of the respondent that s. 25, sub-s. 4 (*d*), justified a claim to deduct the sum of 180*l*., or some part thereof, as expenditure attributable to goodwill or some other matter personal to the owner, occupier, or other person interested for the time being in the land. This section, however, only allows such a deduction if the amount claimed to be deducted is included as part of the total value. In the present case no part of the sum of 180*l*. has ever been included in the estimate of total value, and the claim for deduction under such circumstances appears to me to be inconsistent with the whole framework of s. 25 of the Act of 1910.

My Lords, the appellants are entitled to succeed, having a decision of this House in their favour.

Interlocutors complained of reversed. Each party to bear their own costs before the referee and the costs of the action in the Court of Session. By consent, the appellants to pay the costs of the appeal to this House.

Lords' Journals, December 3, 1914.

Solicitor for appellants : *H. Bertram Cox, Solicitor of Inland Revenue for England, for Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue for Scotland.*

Solicitors for respondent : *Beveridge, Greig & Co., for Patrick & James, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1915 Jan. 25.

GLASGOW AND SOUTH WESTERN RAILWAY COMPANY . . . . . } Appellants;

AND

BOYD & FORREST . . . . . Respondents.

Et e Contra.

Contract—Rescission—Innocent Misrepresentation—Restitutio in integrum.

A claim by contractors for the rescission of a contract for the construction of a railway on the plea that the contract had been entered into under essential error induced by the innocent misrepresentation of the railway company as to the nature of the strata through which the railway passed rejected on the ground that restitutio in integrum had become impossible by reason of the completion of the railway by the contractors after full knowledge of the facts.

Decision of the Second Division of the Court of Session in Scotland, 1914 S. C. 472, reversed.

Appeal from an interlocutor of the Second Division of the Court of Session in Scotland. (1)

There was also a cross-appeal by the respondents on a subsidiary point.

In 1900 the respondents contracted to construct a branch line of railway for the appellants. The railway was completed in 1905, and the contract price was paid together with a further sum for extras. In 1907 the respondents raised this action for reduction of the contract and payment on the basis of a quantum meruit upon the ground that they had been misled by the misrepresentations of the appellants' engineer as to the nature of the strata through which the line passed. They pleaded, first, that the contract was induced by the fraud of the appellants, and, secondly, that it was entered into by them

* *Present:* Earl Loreburn, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Parmoor.

(1) 1914 S. C. 472.

under essential error induced by the appellants' misrepresentations. In a previous appeal to this House, noted [1913] A. C. 404, their Lordships (reversing the decision of the Second Division) held that the charge of fraud was not made out and remitted the case to the Court of Session to determine the other issues in the action. The Second Division (The Lord Justice-Clerk, Lord Dundas, and Lord Salvesen, Lord Guthrie dissenting) held that the respondents were entitled to payment on a quantum meruit.

The appeal raised no doubtful question of law and depended on the special terms of the contract and the conduct of the parties. It therefore does not call for a report.

1914. Nov. 30; Dec. 1, 3, 4, 7. *Younger, K.C., H. P. Macmillan, K.C.*, and the *Hon. William Watson, K.C.* (the two latter of the Scottish Bar), for the appellants.

Clyde, K.C., and *MacRobert* (both of the Scottish Bar), for the respondents.

1915. Jan. 25. Their Lordships, assuming without deciding that the contract had been entered into by the respondents under essential error induced by the innocent misrepresentation of the appellants' engineer, held that the claim for reduction failed on the ground that the respondents by completing the contract with full knowledge of the facts had rendered restitutio in integrum impossible.

Interlocutor of the Second Division of the Court of Session in Scotland, so far as complained of in the original appeal, reversed, and cross-appeal dismissed. Cause remitted to the Second Division to assoilzie the defenders in the action from the conclusions of the summons, finding the pursuers liable in expenses accordingly. (It was then provided that this order and such decree of absolvitor should be without prejudice to the right of the respondents in the original appeal to refer to the arbiter named in the contract certain subsidiary matters in the order specified.) The

H. L. (Sc.) 1915 GLASGOW AND SOUTH WESTERN RAILWAY v. BOYD & FORREST.

respondents in the original appeal to pay the costs of the action in the Court of Session, so far as not already disposed of by the order of this House of April 3, 1913, and also the costs of the original and cross appeals to this House.

Lords' Journals, March 1, 1915.

Agents for appellants: *Sherwood & Co., for Maclay, Murray & Spens, Glasgow, and John C. Brodie & Sons, W.S., Edinburgh.*

Agents for respondents: *Balfour Allan & North, for Mac-Robert, Son & Hutchison, Solicitors, Glasgow, and Pringle & Clay, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* 1915 *March* 29. SMITH . . . . . Appellant;

AND

D. DAVIS AND SONS, LIMITED . . . . Respondents.

Employer and Workman—Compensation—Medical Examination—Refusal to submit to Second Examination—Suspension of Right to Compensation—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., pars.* 4, 14, 15.

Under paragraph 4 of the First Schedule to the Workmen's Compensation Act, 1906, the right of an employer to require a workman who has given notice of an accident to submit to a medical examination is not confined to a single examination.

In January, 1911, a workman sustained an injury by accident entitling him to compensation under the Act, and under a voluntary arrangement he received compensation from his employers till June, 1911, when he returned to work. In 1912 he ceased work owing to an illness not due to the accident. In June, 1913, on his recovery from that illness, he gave notice to his employers of a claim for compensation on the ground that he was partially incapacitated by reason of the accident, and on their request submitted to a medical examination. In September he took proceedings to enforce his claim. Thereupon the employers required him to submit to a second medical examination, and,

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* *Present:* Earl Loreburn, Lord Atkinson, and Lord Parker of Waddington.

on his refusal, obtained from the county court judge an order suspending his right to compensation :—

Held, that the employers were entitled to require the workman to submit to a second examination provided that the requirement was reasonable, which was a question for the county court judge.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal (Cozens-Hardy M.R., the President of the Probate, Divorce and Admiralty Division, and Eve J.) affirming an order of the county court judge of Glamorganshire under the Workmen's Compensation Act.

The question raised by the appeal was whether a workman claiming compensation under the Act could be required by his employers in a proper case to submit to a second medical examination and whether his refusal to submit justified an application by the employers to the county court judge for an order suspending his right to compensation.

The county court judge made the order.

The facts appear sufficiently from the head-note and from the judgments of Earl Loreburn and Lord Parker of Waddington.

1915. March 15, 16. *Leslie Scott, K.C.*, and *A. T. James*, for the appellant. The question is whether an employer is entitled in the course of the same proceedings to require a workman who is claiming compensation to submit to a second medical examination. Sched. I. in dealing with the right of an employer to require a workman to submit to a medical examination has provided for two types of occasion : 1, where the workman seeks to establish his right to receive compensation ; 2, where the workman is in receipt of compensation and the question arises whether he has recovered to any and what extent from his incapacity. Paragraph 4 deals with the first case, and paragraph 14 with the second. The contrast in the language of the two paragraphs is significant. Paragraph 4 contains no provision for a second examination, whereas paragraph 14 provides for an examination from time to time. Paragraph 15, which applies to both paragraph 4 and paragraph 14, provides that a workman shall not be required to submit himself for examination otherwise than in accordance with regulations made by the Secretary of State. But the regulations made under paragraph 15 (Regulations

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issued June 28, 1907) do not deal with the number of examinations under paragraph 4, and the inference to be drawn from the language of these regulations is that only a single examination under paragraph 4 was contemplated by the Secretary of State. Where money is paid under a voluntary arrangement and that has come to an end the more convenient course, and that which is usually followed, is for the workman to come to the Court to establish his right to compensation as on the original accident, and he is then in the same position as if he had applied for arbitration in the first instance. This case therefore falls under paragraph 4 and not under paragraph 14. Under the former paragraph the employer cannot insist upon more than one examination. The refusal of the workman to submit to a second examination gives the employer no right to obtain an order of suspension.

[They referred to *Osborn* v. *Vickers, Sons & Maxim* (1); *Major* v. *South Kirkby, Featherstone and Hunsworth Collieries* (2); *Taylor* v. *London and North Western Ry. Co.* (3); and *Nicholson* v. *Piper*. (4)]

Scott Fox, K.C., and *A. Parsons, K.C.*, for the respondents. It is immaterial whether paragraph 4 or paragraph 14 is the determining clause in this case. Paragraph 4 does not limit the employer's right to a single examination. Two protections are given to the workman. First, the request of the employer must be reasonable: *Morgan* v. *William Dixon, Ld.* (5) Secondly, a discretion is given to the Secretary of State to make any further regulations governing the matter. This appeal is brought, not to remedy any hardship, but to establish the general proposition that under no circumstances does paragraph 4 authorize a second examination. *Major* v. *South Kirkby, Featherstone and Hunsworth Collieries* (2) is directly in point and was rightly decided. There being no regulation by the Secretary of State limiting the right of the employer, the matter is left to the discretion of the county court judge under r. 58 of the Workmen's Compensation Rules, and it is for him to determine the reasonableness of the

(1) [1900] 2 Q. B. 91.
(2) [1913] 2 K. B. 145.
(3) [1912] A. C. 242.
(4) [1907] A. C. 215.
(5) [1912] A. C. 74, at p. 79.

employer's request. Assuming that the case falls under paragraph 14, the requirements as to time of clause 2 of the Regulations issued by the Secretary of State have been complied with.

A. T. Jamés replied.

The House took time for consideration.

March 29. EARL LOREBURN. My Lords, in this case, Charles Smith, a workman, who was injured by accident so as to be entitled to compensation under the Workmen's Compensation Act, complains of an order suspending his right to proceed under that Act until he submits himself to examination by a medical practitioner on behalf of his employers.

The injury occurred on January 27, 1911. Without any proceedings before an arbitrator the employers paid him a weekly sum as compensation under the Act. In June, 1911, the workman resumed work and continued till August, 1912, receiving no payment from his employers for compensation during that time. In August, 1912, Smith stopped work owing to an illness not due to the accident, namely, Bright's disease. On June 18, 1913, he had recovered from the Bright's disease, but as he claimed to be partially incapacitated by the old accidental injury, he served his employers with notice that unless he could obtain from them some light employment he must have full compensation under the Act.

Thereupon the employers required him to submit to medical examination, and he was accordingly examined on June 26, 1913, by their medical man. On September 10 he filed a claim in the county court asking for compensation from August 12, 1912. The employers denied liability, alleging that he had recovered. On September 22 the employers required him again to submit to a medical examination and he refused. Upon this the employers asked for and on November 6, 1913, obtained from his Honour Judge Bryn Roberts an order suspending proceedings under the Workmen's Compensation Act until he complied with that requirement. That is the order now the subject of this appeal. Had the learned judge power to make that order? In

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substance the point argued was whether or not the workman was bound to submit himself to this examination, it being freely admitted that there was nothing unreasonable in the requirement. The answer depends upon the Act and the Regulations made under it.

I think the scheme and effect of the Act and Regulations are as follows:—

After the workman has given notice of an accident there is a period preliminary to any decision. The employer may desire to learn from his own medical adviser what is the physical condition of the workman in order that he may determine what to do. Either he will admit liability and agree to make weekly payments, or he will dispute liability in whole or in part and prepare himself for the trial. His right to require a medical examination during this, which I will call the first period, is defined by paragraphs 4 and 15 of the First Schedule to the Act. It may be that these paragraphs cover more than this. I will not pursue that question or further examine these paragraphs for the moment. Clearly they apply to this first period.

Then comes a second period during which a similar medical examination may be required. If either by agreement or by the award a weekly payment has to be made by the employer, the amount may have to be reviewed and ended, or diminished or increased. An employer's right to require such medical examination during this period is defined in paragraphs 14 and 15 and in regulations 1 and 2 of June 28, 1907. "Any workman receiving weekly payments under this Act" is from time to time to submit himself for medical examination (paragraph 14), but not otherwise, nor at more frequent intervals than is prescribed by regulations (paragraph 15). And the regulations prescribe certain intervals applicable to the case of "a workman in receipt of weekly payments" (second regulation of June 28, 1907).

Now, with all respect, I do not think we are at liberty to read any qualifying words into these provisions. I cannot see why they are not applicable to the case of a man who is receiving weekly payments by oral agreement just as much as if a memorandum had been recorded or as if the sums were payable under

an award. The purpose seems to me to be exactly what the words say. If the employer for any reason, whatever it may be, does not make the weekly payment, he has no right to have a medical examination under these provisions, and he and the workman are left to their rights without the obligation on the workman of submitting to the examination imposed by these provisions. If, on the other hand, the workman is receiving weekly payments under the Act, it does not signify whether there is a memorandum or an award or an unrecorded agreement, provided that the man is in fact being paid in respect of the rights conferred upon him by the Act. It would be different if the money were being paid as an act of mere charity or benevolence, for in that case no part of the Act has any application. I am of opinion that paragraph 14 has nothing to do with the present appeal, because, though payments had been made under the Act, the man was not receiving weekly payments under it at the time the medical examination was required and had not been receiving them for many months.

But there is also another contingency which may arise and has arisen in the present case. It may be that weekly payments have been made and are then discontinued because of the workman's recovery or for other reasons. What is the right of the employer to have a medical examination if he is asked to recommence them? The specific contingency is not expressly and in particular terms provided for. It cannot be met by paragraph 14 and its dependent provisions, for the reason already stated. Can it be met by paragraph 4 of the First Schedule? To answer this I must now return to paragraphs 4 and 15.

In my opinion, paragraph 4 relates, as I have said, primarily to the first period, before the employer's liability has been admitted or adjudicated by the arbitrator. But I think it also covers more than that. The paragraph takes effect "where a workman has given notice of an accident." I see no reason for cutting down these words. If there has been an agreement or an award, and weekly payments under the Act are being made, then paragraph 4 will be superseded by the more particular provisions of paragraph 14. In this case it will apply, for here the workman has given notice of an accident.

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What then are the duties as to submitting himself for medical examination which are imposed by paragraphs 4 and 15?

The workman must submit to examination if so required by the employer, but neither paragraph 4 nor paragraph 15 says how often, nor is there any regulation saying how often. It is to my mind out of the question to say that only one such examination can be required. There is nothing, either in the Act or in the good sense of the thing, to warrant any such limitation. It follows that under paragraph 4 the workman must submit to examination when it is reasonably demanded by the employer.

In the present case it is not suggested that the requirement is unreasonable or that the learned county court judge, who is the person to decide, was asked to treat it as unreasonable. He had full power and I have no doubt was perfectly right to make the order complained of, and this appeal must be dismissed with costs.

LORD ATKINSON. My Lords, the facts are not disputed in this case. It is unnecessary to restate them at length.

On June 18, 1913, the appellant having recovered from Bright's disease, but alleging that he had become partly incapacitated from the effect of the early injury, served a notice in a very peculiar form. In this notice the cause of incapacity is stated to be the old injury; no date is given for accident, and the fact, of which notice purports to be given, is that the appellant was injured while in the respondents' employment.

The notice was, I think, intended to be a notice under the fourth of the paragraphs in the First Schedule to the statute, and not a document served as a preliminary to proceedings to be taken for the review under paragraph 16 of a weekly payment. I think this is clear from the contents of the application for arbitration, dated September 10, 1913, served by Messrs. Morgan, Bruce & Nicholas, appellant's solicitors. In it the weekly payments made from January 27, 1911, the date of the accident, till June 11 following are treated as benefits received from the employer which are to be taken into account under paragraph 3 of the same schedule in estimating the compensation.

Moreover, the applicant relied in argument on the decision of the Court of Appeal in *Major* v. *South Kirkby, Featherstone and Hunsworth Collieries* (1), in which it was held that the weekly payment mentioned in paragraph 14 is a weekly payment to which the workman has become entitled either under an award, or under an enrolled agreement which could be enforced as a judgment of a county court, i.e., a weekly payment in reference to which the workman stands to his employer in the relation of a judgment creditor. It is not necessary for your Lordships in this case to decide this latter point. The importance of the appellant's reliance upon the decision consists in this, that it shows what he considered was the true nature of his objection, and what the precise point he desired to raise. That point is, in my view, clearly this, that where a workman serves, under paragraph 4, notice of an accident, he is absolutely entitled to refuse to be examined by a medical practitioner, provided and paid by his employer, more frequently than once, whether that refusal be reasonable or unreasonable; which in effect means that the county court judge had in the present case no jurisdiction to make the order he has made, and that the decision of the Court of Appeal in *Major* v. *South Kirkby, Featherstone and Hunsworth Collieries* (1) should be overruled.

On October 4, 1913, the respondents served upon the appellant notice of their intention to apply to the county court judge, having jurisdiction in the case, for an order to suspend the appellant's right to compensation, and his right to take or prosecute any proceeding under the statute in relation thereto.

This application having come before the county court judge on November 6, 1913, he made the order applied for.

It has been already decided by your Lordships' House that a county court judge, in dealing with applications such as this, is bound to act reasonably. If in any particular case the second or third application to submit to a medical examination be, in the opinion of the county court judge, unreasonable under all the circumstances of the case, he has full power to refuse to inflict upon the workman the penalty of suspension. This is a complete protection to the workman against any attempt on the

(1) [1913] 2 K. B. 145.

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part of the employer to harass him by repeated requests to submit himself to repeated medical examinations.

The contention put forward on the appellant's behalf that this and other evils would follow if a workman were bound to submit himself more than once to an examination has, therefore, no substance in it. One of the objects of the Act and of the Rules in the schedule attached to it clearly is that settlements of claims for compensation should, if possible, be arranged by agreement between the employer and the workman. Nothing, I think, could be more calculated to defeat that object, and nothing could be more opposed to common sense and reason, than to require that an employer should make up his mind, in all cases definitely on the result of one examination, whether he would or would not resist the workman's claim. In the present case, for instance, three months elapsed between the date of the first examination and the demand for the second. A still further time might in many cases elapse.

The employer, and indeed the workman, are both interested in having a medical examination made as soon after the accident as possible, in order that both of them may be able to fix the time when the incapacity to work, if it supervened, had commenced. Again, symptoms of bodily hurt in their early stages might be of such an obscure nature that it would be quite impossible to ascertain by one examination whether they would soon abate or pass away, or whether some incapacity more or less permanent might not supervene. Of course if the language of paragraph 4 be so plain that it admits of no other construction than that contended for by the appellant, one must adopt that construction, however irrational, absurd, or mischievous the result, but unless one is coerced to adopt a construction from which such consequences may follow, it ought not to be adopted.

It is in my view clear that the words of paragraph 4 need not be read as if the words "once but only once" were written into it between the words "submit" and "himself." The submitting "himself for examination" provided for is a "process," not a single act. It may necessitate one or more acts to effect its object, namely, to ascertain the bodily condition of the sufferer.

I think paragraph 15 strongly supports this conclusion,

inasmuch as the concluding words of the first sentence of that paragraph "or at more frequent intervals than may be prescribed by those regulations" cannot be confined in their application to paragraph 14. I think these words apply equally to paragraph 4, and if so, they indicate conclusively that more than one submission to examination was contemplated in the framing of this fourth paragraph.

I am clearly of opinion, therefore, that the county court judge had jurisdiction to make the order which he made, and that the judgment appealed from was right and should be affirmed, and this appeal be dismissed with costs.

LORD PARKER OF WADDINGTON. (1) My Lords, the appellant in this case on January 27, 1911, met with and was injured by an accident arising out of and in the course of his employment by the respondents. The weekly sum payable to him under the Act was agreed at 16*s.* 8*d.*, and this sum was paid to the appellant by the respondents from January 27 to June 11, 1911. On June 11, 1911, the appellant returned to work and the weekly payment was discontinued. On August 12, 1912, the appellant ceased work, being incapacitated by Bright's disease, which he admits was not due to the accident. On June 18, 1913, the appellant, having recovered from Bright's disease, gave notice to the respondents of a claim to compensation based on the contention that he was partially incapacitated from work by reason of the accident. Thereupon the respondents required him to submit and he accordingly on June 26 submitted to examination by a duly qualified medical practitioner. Nothing further was done until September 10, 1913, when the appellant instituted proceedings in the county court of Glamorganshire for the purpose of enforcing his claim. On September 22, 1913, the respondents again required the appellant to submit to medical examination, and upon his refusing applied to the county court judge for an order suspending the appellant's right to compensation or to take or prosecute proceedings under the Workmen's Compensation Act, 1906. The county court judge granted the application, and an appeal from his decision was

(1) Read by Lord Dunedin.

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dismissed by the Court of Appeal. The appellant is now asking your Lordships to reverse the orders made in the Courts below.

My Lords, paragraph 4 of the First Schedule to the Workmen's Compensation Act, 1906, provides that: "Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and, if he refuses to submit himself for such examination, or in any way obstructs the same, his right to compensation and to take or prosecute any proceeding under the Act in relation to compensation, shall be suspended until such examination has taken place."

Paragraph 14 provides that: "Any workman receiving weekly payments under this Act shall, if so required by the employer, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place."

Paragraph 15 provides that: "A workman shall not be required to submit himself for examination by a medical practitioner under paragraph 4 or paragraph 14 of this schedule otherwise than in accordance with regulations made by the Secretary of State, or at more frequent intervals than may be prescribed by those regulations."

The last-mentioned paragraph of the First Schedule obviously contemplates that a workman may have to submit to a medical examination under paragraph 4, as well as paragraph 14, more than once, and paragraph 4 is, in my opinion, quite consistent with his having to do so, though it is open to the Secretary of State to prescribe that the examinations shall not take place otherwise than at certain intervals. The only regulations made by the Secretary of State on this subject are those of June 28, 1907, which prescribe the intervals at which examinations under paragraph 14 are to take place, but are silent as to examinations under paragraph 4.

My Lords, if, as I think, the fourth paragraph contemplates

more than one medical examination, and the regulations of the Secretary of State are silent as to the number of examinations which are permissible, the question whether the appellant was justified in refusing to be examined as required by the respondents on September 22, 1913, depends upon whether the requisition was reasonable under the circumstances, a question of fact not for the decision of your Lordships, but of the county court judge who dealt with the matter, and whose finding can only be disturbed if, as a matter of law, the requisition could not under any circumstances have been properly made. This, in my opinion, is the result of your Lordships' decision in *Daniel Morgan* v. *William Dixon, Ld.* (1) The appellant bases his contention that the requisition could, under no circumstances, have been properly made, first, on the contention that paragraph 4 contemplates only one examination—a contention which is, in my opinion, sufficiently disposed of by reference to paragraph 15; and secondly, on the absence of any regulations in that behalf of the Secretary of State under paragraph 15. In my opinion paragraph 15 must not be read as prohibiting any medical examinations which the Secretary of State does not specifically authorize, but as leaving the county court judge to determine whether any proposed examination is reasonable under the circumstances, subject only to any regulations made by the Secretary of State as to the intervals at which such examinations are to take place.

My Lords, some discussion occurred in the course of argument as to the meaning of the words "any workman receiving weekly payments under this Act" in paragraph 14 of the schedule, and the corresponding words "a workman in receipt of weekly payments" in the Regulations of June 28, 1907. Counsel on both sides seemed disposed to agree that these words could not apply to workmen who had for a time received weekly payments, but had ceased to receive them because the incapacity during which alone they were payable had, or was alleged to have, come to an end. I prefer to reserve my opinion on this point, though, as a matter of practice, it can be of very little importance. If the cessation of payment of the weekly sum to

(1) [1912] A. C. 74.

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which the workman is entitled under the Act puts an end to the operation of paragraph 14, the right of the employer under paragraph 4 must, in my opinion, be held to revive, and if, as I think, recurrent examinations are possible under that paragraph, no difficulty would occur in practice, nor would any injustice or inconvenience be caused to either employer or workman.

In my opinion the appeal fails and should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 29, 1915.

Solicitors for appellant: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondents: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

[HOUSE OF LORDS.]

H. L. (E.)* 1915 *Feb.* 8.

HAYWARD . . . . . APPELLANT;

AND

WESTLEIGH COLLIERY COMPANY, LIMITED . . . . . RESPONDENTS.

Employer and Workman—Compensation—Accident arising out of and in Course of Employment—Notice of Accident—Default in giving Notice—Employer prejudiced in his Defence—Evidence—Burden of Proof—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1 *and* 2.

A miner, who was employed at a colliery in moving tubs from the working place to the shunt, arrived at the colliery apparently in his normal health, but in the course of his work he was seen by two of his fellow workmen to be rubbing his knee and to limp, and on his return home he had a slight abrasion on the knee. The next day he absented himself from work owing to the injury to his knee, and after resuming work again for two days he called in a doctor. A week after the injury his wife verbally informed the fireman at the colliery that her husband had got hurt in his knee with the tub in the pit and that that was the reason of his absence. Two days afterwards the man died from blood poisoning set up by the injury to his knee. No notice in

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* *Present:* EARL LOREBURN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

writing of the accident as required by s. 2 of the Workmen's Compensation Act, 1906, was given to the employers until a fortnight later. Upon a claim for compensation by the widow, the county court judge found (1.) that the death resulted from an injury by accident arising out of and in the course of the deceased's employment; (2.) that the employers had not been prejudiced in their defence by the want of notice:—

Held, that there was evidence to support these findings.

The question of the burden of proof in determining whether the employer is prejudiced in his defence by want of notice of the accident considered.

Decision of the Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal reversing an award of the county court judge of Lancashire under the Workmen's Compensation Act. The appellant, who was the widow of Enoch Hayward, applied on behalf of herself and her three infant children for compensation from the respondents in respect of the death of her husband. The deceased was employed as a drawer at the respondents' colliery. The respondents disputed liability on the grounds (1.) that the death of the deceased was not the result of injury caused by accident arising out of and in the course of his employment and (2.) that notice of the alleged accident was not given to the respondents as required by the Act.

The facts proved at the arbitration were as follows: On the morning of April 1, 1913, the deceased when he left home to go to his work was apparently in his normal state of health, and on his return home he had a slight bruise and a slight breakage of the skin on his knee. The colliery was more than half an hour's walk from his home. The work of the deceased at the colliery was to take full tubs from the working place to the shunt. When he went down the mine he seemed all right, but later in the morning two boys who worked near him saw him sit down and rub his knee, and when he walked he seemed to limp a little. He complained to one of the boys that his knee hurt him and the boys helped him to shove the tubs. On the next day, which was a Wednesday, he did not go to work; his knee was sore and swollen. On the two following days he went to work as usual. On the next day, Saturday, the appellant called in a doctor, and the deceased was very poorly all night. On Tuesday, April 8,

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the appellant saw Pollitt, the fireman at the respondents' colliery, and told him that the deceased had got hurt in his knee with the tub in the pit and that that was the reason he was staying away from work. On receiving this information Pollitt made inquiries at the mine, but could find out nothing about the accident. On the 9th the deceased was taken to the Wigan infirmary, and he died on the 10th from blood poisoning set up by injury to the right knee. Notice in writing of the accident was given to the respondents on April 24. At the hearing before the county court judge the respondents adduced no evidence on the question of prejudice, but after he had made his award they suggested that if proper notice had been given there might have been a conflict of medical testimony. The county court judge, however, refused at that stage to allow the medical evidence given at the trial to be challenged.

The county court judge inferred from the evidence that the accident occurred in the course of the deceased's work at the pit on the morning of April 1 and arose out of and in the course of his employment. On the question whether the employers were prejudiced in their defence by the absence of notice, treating the question as one of fact on which the burden lay on the applicant, he came to the conclusion in all the circumstances of the case that the employers had not been prejudiced. He therefore made an award in favour of the applicant.

The Court of Appeal (Cozens-Hardy M.R., the President of the Probate, Divorce and Admiralty Division, and Eve J.), without expressing any opinion on the question whether the death resulted from injury caused by accident arising out of and in the course of the employment, held that there was no evidence to support the finding of the county court judge that the employers had not been prejudiced by the want of notice.

Compston, K.C., and *Cyril Atkinson*, K.C. (with them *Stuart Bevan*), for the appellant. It must be conceded that notice in writing of the accident was not given as soon as practicable, but it is submitted that the appellant has discharged the onus which lay upon her of showing that the respondents were not prejudiced in their defence by the delay. The default is excused

if the applicant shows that there was no probable cause by which the employer could be prejudiced. The question of prejudice is a question of fact for the county court judge and there is evidence to support his finding.

Rigby Swift, K.C., and *J. E. Singleton*, for the respondents. 1. There is no evidence to support the finding of the county court judge that the deceased met with an injury by accident arising out of and in the course of his employment. 2. With regard to the want of notice, notice ought to have been given on the day after the accident when the deceased found he could not do his work: per Kennedy L.J. in *Snelling* v. *Norton Hill Colliery Co.* (1) The respondents were prejudiced by being deprived of the opportunity of subjecting the man to a medical examination and of making an immediate inquiry into the circumstances of the accident and testing the truth of the man's story. There is no evidence to show that the respondents were not prejudiced in their defence.

EARL LOREBURN. My Lords, in this case I regret that I cannot agree with the opinion expressed by the Court of Appeal.

There are two questions. The first is, was there evidence which warranted the learned county court judge in finding that the injury was an injury by an accident arising out of and in the course of his employment? The deceased was a man who worked at a colliery bringing full tubs from the working place to the shunt, and it was proved that scratches are very common on the arm or the leg when men in this employment come into contact with the tub or with the coal face or with stones. On April 1 the deceased went to work, his knee being perfectly sound, at 5 o'clock in the morning; at 7 o'clock he was seen working in the colliery and seemed all right; an hour or two after that he was not all right, but required help in pushing his tub, which is not usually required. He was seen to rub his knee and he limped a little. He complained that his leg was hurt twice on that morning in the colliery and he came home just before 3 o'clock and did not walk as usual. After dinner he set to and bathed his knee;

(1) (1913) 6 B. W. C. C. 506.

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there was a slight bruise on the knee which his wife saw and a slight breakage of the skin, "not much to complain of you would think," she said, but he complained that it hurt him. On April 2 his knee was sore and swollen and he did not go to work; on April 3 he went to work and came back again much worse; on April 4 he went to work and his leg was swollen and red; on April 5 he sent for the doctor, who said he had a septic knee—that was on the Saturday; on the Wednesday following he was taken to the hospital, and on the Thursday he died, and it is admitted by the learned counsel in the case that he died from the injury caused to his knee. My Lords, when the doctor saw him he said he had a septic knee, that there was a small abrasion, and that it was consistent with the injury on April 1 by contact with the tub.

Now, my Lords, is not this evidence upon which a reasonable man is permitted to act and to say that this man hurt his knee in the colliery on the morning of April 1 in the course of his employment and that the injury arose out of his employment? Is it necessary to bring some one who saw the accident? Surely not. If circumstantial evidence is of any value, surely there was ample circumstantial evidence here.

The Court of Appeal did not find upon that, but they said that it was a case very near the line and that they would decide upon the other point. It was submitted that no reasonable man could act in the way in which the arbitrator did act. My Lords, if any jury were told this story they would say, Why of course he hurt his knee when he was working in the colliery that morning. They would say that it was not demonstrated,—and few things ever are demonstrated in this world,—but that this was the most probable view, the view upon which they were entitled to act.

My Lords, I now pass to the second point, which prevailed in the Court of Appeal, and that is whether sufficient notice was given of this accident. Notice admittedly was not given in the form required by the statute, that is to say, a written notice; but then the Act says that that is not to be a bar to the maintenance of proceedings if it is found that the respondent is not prejudiced in his defence by the want of such notice. My Lords, I think the statute really means that looking

at all the matters before him the arbitrator must find that the employer was not prejudiced by want of notice. I do not think it means there is to be a presumption one way or another, but simply if upon all the facts before him the arbitrator is not satisfied that there was no prejudice, then the applicant fails. The arbitrator in this case found that the employer was not prejudiced. What were the facts before him on that point? That the injury was caused on April 1, that it was slight, that it was evident that the wife thought the man Pollitt had been told; but we cannot find and it is not proved at all that Pollitt was told of this accident verbally. On April 8, however, he was told, and on the 9th he made full inquiries. He learned nothing. He does not say that he could have learned more if he had made inquiries earlier, and no one at the hearing suggested that if proper notice had been given any further evidence could have been called or any further information could have been as a fact acquired by the company. At the hearing no one was called to show that more information could have been obtained if notice had been given sooner or to show that in point of fact the employers were prejudiced in any way by the absence of notice. The employers were the people who knew best whether they had been prejudiced and they gave no evidence upon the subject. It comes therefore to this, that there being no inherent probability that I can see from the facts that the company would be prejudiced by the absence of notice for a few days, those who knew best whether they had been prejudiced, namely, the respondents, gave no evidence to say that they had been prejudiced. If they had said that they had been prejudiced they would have had to give reasons and to state how and why the prejudice had arisen to them and give the appellant the opportunity of showing that it could not have arisen. The learned county court judge came to the conclusion that there had been no prejudice. It may be—I think it is—that this is a case somewhat near the line, but I think the learned county court judge when he heard the facts of the case themselves was warranted in coming to the conclusion that no prejudice had occurred at all.

Under those circumstances, my Lords, I am of opinion that the award made by the learned arbitrator ought to be confirmed.

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LORD ATKINSON. My Lords, I concur. With regard to this matter of prejudice I only wish to say a word. The statute requires that notice should be served, and if it is not served the party who should have served it is in default; he must excuse that default, and I think the burden of proof in the first instance rests upon him. But if he gives evidence from which it may be reasonably inferred that the employer has not been prejudiced, I think then the burden of proof is shifted from his shoulders on to the shoulders of his employer, and if the employer is in a position to prove notwithstanding this evidence that he is prejudiced in some particular matters he is bound to do so. If he omits to do that,—as he has omitted to do it in this case,—then my impression is that it is not open to him to conjecture, as he has endeavoured to do through his counsel here, that he might have done this, or he might have done that, or he might have done something else that would have rebutted the evidence which has been given on behalf of the workman. He abstained from doing that, and then he says "By reason of those conjectures which I have not supported you are to come to the conclusion that I was prejudiced."

My Lords, I think there was ample proof in the absence of all evidence in this case other than that tendered upon which the learned county court judge might fairly, justly, rightly, and reasonably conclude that the employer was not prejudiced.

LORD PARKER OF WADDINGTON. My Lords, I concur. I will only say that I think this is one of those cases in which it is important to bear in mind the distinction between questions of law which may possibly be decided by the arbitrator and questions of fact. In this particular case the question is whether as a matter of fact there was any prejudice arising to the company by reason of notice not having been given at the time and in the manner mentioned by the Act. The arbitrator found that there was no such prejudice. In acting as a Court of Appeal from that decision it is absolutely impossible to set it aside unless the circumstances be such that no reasonable man could from the evidence before the arbitrator have come to that conclusion, and it appears to me for the grounds stated by my noble friend on the

woolsack that there was evidence which in this case would justify a reasonable man in coming to the conclusion that the learned arbitrator came to.

My Lords, the same principle really applies to the question whether the accident arose out of and in the course of the employment, and on that part of the case it does not seem to me that I can usefully add anything.

LORD SUMNER. My Lords, I concur. On the question whether there was any evidence which supports the learned county court judge's finding that the accident arose out of and in the course of the employment I need add nothing; no ground is made out for interfering with it. Had he found the other way it may well be that there would have been evidence before him sufficient to support such a finding; but the matter was for him, because there was evidence upon the question and the decision is upon a matter of fact.

The other question is whether there was evidence sufficient to warrant the finding that the employer was not prejudiced in his defence. Notice was not given as early as notice should have been given. A written notice was given eventually, but it was too late to be relied upon. His Honour had to say at what time notice should have been given and whether the delay in giving notice did in fact prejudice the employer in his defence.

The finding that has to be arrived at is, of course, a finding upon all the facts proved. I do not think those facts include the mere matter of observation that the defendant does not give evidence or does not call certain witnesses whose absence is not accounted for. The learned arbitrator has to take the facts as they have been proved before him, and if it be a case in which facts are proved on both sides he has to take the totality of the facts as he finds them and then come to his conclusion. The question for the Court of Appeal upon that is whether the totality of such facts contains evidence upon which he could without error in law come to his actual finding of fact.

My Lords, I think there was evidence upon which the learned judge could find that in the various directions in which prejudice

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to the employer in his defence might have occurred no prejudice actually was experienced. It is suggested that other inquiries might have been made if earlier notice had been given; but in fact all the witnesses of the accident were examined on one side or the other, and, as the learned county court judge believed the two witnesses who were called for the applicant, it cannot be assumed that, had they been questioned by the employer earlier, they would have told any different tale. It is not suggested that anybody else was present in the pit at the time when, under the first finding that the accident arose out of and in the course of the employment, the accident must have occurred.

It is then suggested that something might have been done if a doctor had been instructed by the employer to examine the workman; but as to that, upon the facts which are proved and the estimate which the learned county court judge formed of the good faith of the case, the only substantial suggestion that can be made, as it appears to me, is that such a doctor might have furnished the employer's solicitor with materials upon which he could have instructed his counsel to cross-examine the doctor for the applicant more extensively than was done. That is a speculative and unsubstantial suggestion of prejudice.

My Lords, the third way in which it is suggested that prejudice may have occurred is that the deceased man might have been asked what had happened to him while he was still able to give his own account. As the case is found to be raised in good faith, one cannot assume that such an investigation would have yielded any other result than that which the applicant's evidence gave. It is always competent to the employer to suggest in argument, without necessarily calling witnesses to prove it, that this, that, or the other might have been done, but when one comes to examine the things suggested here they have little substance and do not so far balance the evidence which was given by the applicant to the effect that no prejudice in the defence was caused as to make it possible to interfere with the learned county court judge's finding, that in fact no prejudice in the defence was caused.

LORD PARMOOR. My Lords, I concur. I propose to say a few words only on the second point, that is the question of notice. I gather from the judgment of the learned county court judge that he found that the notice was not given in fact as soon as practicable. It is for that reason that importance arises on the construction of the proviso to s. 2 of the Act. The question is what is the character of a defect or inaccuracy which would be a bar to the maintenance of proceedings under the Workmen's Compensation Act. The words are these: "The want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect or inaccuracy." Now it has been found in this case in the proceedings for settling the claim that the employer has not been prejudiced in his defence by the want or defect or inaccuracy. Therefore, my Lords, I apprehend the only question to be whether in coming to that conclusion there is any error in law on which the learned county court judge can be put right in the Court of Appeal or in this House. In my opinion there is no error in law of that kind. There is evidence upon which it was competent for him to come to the conclusion which he did, and so long as there is competent evidence the weight of that evidence is wholly for him and not for any other Court at all.

Order of the Court of Appeal reversed and award of the county court judge restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, February 8, 1915.

Solicitors for appellant: *J. Woodhouse, for T. R. Dootson, Leigh, Lancashire.*

Solicitors for respondents: *W. Pingree Ellen, for Peace & Darlington, Liverpool.*

[HOUSE OF LORDS.]

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TRUSTEES OF THE HARBOUR OF DUNDEE . . . . . Appellants;

AND

D. & J. NICOL AND OTHERS . . . . . Respondents.

Harbour Trustees—Statutory Trust—Ultra vires—Action of Interdict by Harbour Ratepayer—Title to sue.

A franchise of ferry within certain defined limits was vested by Act of Parliament in a statutory body of harbour trustees who maintained a service of steamers for ferry traffic. When the steamers were not required for ferry traffic the trustees let them out on hire for excursion trips beyond the ferry limits. A firm of shipowners, who let out steamers on excursion trips, and who paid rates to the trustees for the use of the harbour, brought an action of interdict to restrain the trustees from so using their steamers:—

Held, (1.) that the acts complained of were ultra vires; (2.) that as harbour ratepayers the shipowners had a good title and interest to sue.

Decision of the Second Division of the Court of Session in Scotland, 1914 S. C. 374, affirmed.

APPEAL from interlocutors of the Lord Ordinary and of the Second Division of the Court of Session in Scotland. (1)

The appellants were incorporated by the Dundee Harbour and Tay Ferries Consolidation Act, 1911 (1 & 2 Geo. 5, c. lxxx.), under the name of the Trustees of the Harbour of Dundee, in succession to the then existing trustees, and by the said Act the Dundee harbour and the Tay ferries within the limits therein respectively defined were vested in them.

The respondents were shipowners and shipbrokers of Dundee and they owned the steamship *Marchioness of Bute*, which they let out for excursion trips on the Tay during the summer and autumn months. The respondents presented a note of suspension and interdict against the appellants claiming to restrain them

* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, and LORD PARMOOR.

(1) 1914 S. C. 374.

from engaging in passenger steamer traffic on the Tay outwith the boundaries of the Tay ferries or at all events outwith the boundaries of the harbour of Dundee as defined by the Act of 1911. The respondents were ratepayers of the harbour of Dundee and they were qualified to vote at the elections of the harbour trustees and also to be elected as such trustees.

The appellants were bound by s. 190 of the Act of 1911 to maintain a ferry service of at least sixteen trips a day from Dundee to Newport and a similar service from Newport to Dundee, and in order to ensure that the service should be regular and uninterrupted they kept three boats for Tay ferry traffic. Two of these were old boats, but the third, the *Newport*, was a new boat acquired by their predecessors in title in 1911, and it had ever since been employed in the ferry service. Except on Saturdays only one boat at a time was employed for the actual service of the ferries, but on Saturdays two boats as a rule were used. It was, however, necessary to keep a third boat in reserve to provide for possible accidents and for the periodical overhauling of the boats in accordance with the Board of Trade requirements. On several occasions in 1911 and 1912 the appellants let out their steamers, and particularly the *Newport*, when not required for ferry traffic, by the day or half-day for excursion trips on the Tay outwith the boundaries of the ferry and harbour as defined by their Act, and they claimed the right to do this. The respondents complained that this letting out by the appellants of their vessels on hire was ultra vires and that it interfered with the respondents' business. The appellants alleged (1.) that the acts complained of were within their powers and (2.) that the respondents had no title to sue. The respondents based their right to sue partly on their position as rival traders and partly on their liability as ratepayers of Dundee harbour.

After a proof the Lord Ordinary (Skerrington) granted interdict and prohibited the appellants from carrying passengers by means of the Tay ferries steamers from and to places outwith the boundaries of the ferries. The Lord Ordinary held (1.) that the acts complained of were ultra vires in respect that the appellants had no statutory power to carry passengers to any point without the limits of the ferry, and

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(2.) that the respondents had a title to sue as traders complaining of competition by such ultra vires actings, but he rejected their title of ratepayers of the harbour as being too remote.

The Second Division (Lord Salvesen and Lord Guthrie, Lord Dewar dissenting) affirmed the interlocutor of the Lord Ordinary. The majority held (1.) that the respondents had a good title to sue not only as rival traders but also as harbour ratepayers, and (2.) that the traffic complained of was ultra vires inasmuch as the statute did not expressly authorize the use of boats for traffic beyond the local limits of the ferries.

Lord Dewar dissented on both points.

1914. Nov. 17, 18, 19. *Younger, K.C.*, and *Condie Sandeman, K.C.* (with them *W. Ingram*) (the two latter of the Scottish Bar), for the appellants. 1. As to ultra vires: The question is whether the acts complained of are reasonably incidental to the powers of the trustees. A corporation may use in the way most convenient to itself property which is not for the moment being used for its special purposes, and on this principle it is competent for these trustees to let out on hire their spare vessels not used for the time being for ferry traffic. The only alternative is to lay up the vessels and let them rot. The provision in the Act fixing the limits of the ferry does not affect the question; for it was inserted merely for the purpose of regulating the monopoly. In *Attorney-General* v. *Great Eastern Ry. Co.* (1), where a question was raised as to the power of the railway company to let out its rolling stock to another company, Jessel M.R. held that the railway company was acting ultra vires, but only on the ground that the company was claiming to let out on hire, not merely its spare rolling stock, but any quantity of rolling stock which might be required for working the traffic of another railway. That decision was, however, reversed, first by the Court of Appeal and afterwards by the House of Lords. The Court of Appeal by a majority (James and Bramwell L.JJ., Baggallay L.J. dissenting) held that the letting complained of was a legitimate incident of the proper business of the company. The House of Lords held that it was

(1) (1879) 11 Ch. D. 449; (1880) 5 App. Cas. 473.

expressly authorized by the special Act of the railway company, but Lord Selborne L.C. agreed with James L.J. that whatever might be regarded as incidental to, or consequential upon, those things which the Legislature had authorized ought not (unless expressly prohibited) to be held to be ultra vires. In *Foster* v. *London, Chatham and Dover Ry. Co.* (1), which was an analogous case, it was held that a railway company had an implied power of using land acquired for the purposes of the railway in any way it pleased consistently with the purposes for which the company was constituted. In *Forrest* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2) the exact point raised by this appeal was decided by Lord Romilly in accordance with the appellants' contention, and in Massachusetts the same point was decided in the same way by Bigelow C.J. in *Brown* v. *Winnisimmet Co.* (3) These decisions are illustrations of the principle that a corporation may employ the corporate property, when it would otherwise be lying idle and profitless, for such purposes as are not alien to its primary business: see Brice on Ultra Vires, 3rd ed., p. 135. To make these acts ultra vires they must amount to the carrying on of a separate and independent business. But the casual and occasional use of plant not required for the time being for the ferry cannot be fairly called a business at all. *London County Council* v. *Attorney-General* (4) and *Attorney-General* v. *Mersey Ry. Co.* (5) are distinguishable on this ground.

2. As to the right to sue: The respondents claim to sue as rival traders and as harbour ratepayers. Their claim as rival traders fails because mere trade rivalry gives no title to restrain ultra vires actings: *Stockport District Waterworks Co.* v. *Mayor of Manchester* (6); *Pudsey Coal Gas Co.* v. *Bradford Corporation* (7); *Clyde Steam Packet Co.* v. *Glasgow and South Western Ry. Co.* (8) Their claim as ratepayers equally fails because as ratepayers they have no vested interest in the undertaking, and they must show some sort of interest which

(1) [1895] 1 Q. B. 711.
(2) (1861) 30 Beav. 40; affirmed on appeal on different grounds, 4 D. F. & J. 126.
(3) (1865) 93 Mass. 326.
(4) [1902] A. C. 165.
(5) [1907] A. C. 415.
(6) (1862) 9 Jur. (N.S.) 266.
(7) (1873) L. R. 15 Eq. 167.
(8) (1897) 4 S. L. T. 327.

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is not too remote. The possibility of a ferry-boat being lost while engaged on excursion trips and of the loss ultimately falling on the rates is too remote an interest to give the ratepayers any title to sue: *Ewing* v. *Glasgow Police Commissioners.* (1) *Stirling County Council* v. *Magistrates of Falkirk* (2) is not inconsistent with *Ewing's Case.* (1) Applying the test laid down by Lord Justice-Clerk Inglis in *Monklands Ry. Co.* v. *Waddell* (3), these ratepayers are not creditors in the obligations imposed by the statute. The proper party to enforce this public trust is the Crown, and this action should have been brought by the Lord Advocate: *Conn* v. *Renfrew Corporation.* (4) [Upon this point they also referred to Bell's Principles, § 2177, and McLaren on Wills, § 1750.] But assume that the Crown has no title; that gives no right to the respondents, for that would lead straight up to the actio popularis. On no ground has it been shown that the respondents have any title to sue either as traders or as ratepayers or as members of the public.

(Counsel for the respondents were called upon only on the question of the right to sue.)

Clyde, K.C., and *James B. Paton* (both of the Scottish Bar), for the respondents. This is not a mere case of trade rivalry. The respondents are shipowners and traders at the port of Dundee, of which the appellants are trustees; as ratepayers to the harbour they have contributed to the funds of the appellants' undertaking, and they are also qualified electors of the trustees of the harbour. As members of the interest which the appellants are appointed to protect they have a good title to restrain ultra vires actings which are hostile to that interest. The preamble of the Dundee Harbour and Tay Ferries Consolidation Act, 1911, recites that it is expedient that the constitution of the existing trustees should be amended to make them more fully representative of the persons interested in the harbour and commerce of Dundee, and further that it is expedient to authorize the trustees to make further improvements for the benefit of the trade and shipping at the harbour, and s. 10 provides that one half of the body of trustees shall

(1) (1839) Macl. & Rob. 847.
(2) 1912 S. C. 1281.
(3) (1861) 23 D. 1167, at p. 1177.
(4) (1906) 8 F. 905, at p. 911.

be elected by the persons directly interested in such trade and shipping, namely, the Chamber of Commerce, the shipowners, and the harbour ratepayers. The trustees own and exercise all their powers in trust and they are in no sense in the position of an ordinary corporation. It is true that the appellants do not hold their property for the respondents as an ordinary trustee, but the respondents as harbour ratepayers are beneficiaries of the powers of the trustees, and are entitled in that capacity to sue the appellants in respect of a breach of statutory duty which directly affects their interest. In England there may be good ground for recoiling from the notion of a private person vindicating a public trust; but in Scotland there is no form of public machinery for raising public questions, except as regards old Crown corporations, where the officers of State intervened, and in the case of public rights any member of the public may interfere if he can show some kind of interest peculiar to him: Erskine's Institute IV., i., 17; *Duke of Athol* v. *Torrie* (1); *Ross* v. *Governors of Heriot's Hospital* (2); *Sanderson* v. *Lees* (3); *Grahame* v. *Magistrates of Kirkcaldy* (4); *Bruce* v. *Aiton.* (5) Although ordinarily a corporator has no right to sue the corporation, yet where trust funds are held by the corporation a corporator may sue to prevent the maladministration of those funds: *Bow* v. *Patrons of Cowan's Hospital* (6); *Rodgers* v. *Incorporation of Tailors of Edinburgh* (7); *Morrison* v. *Incorporation of Fleshers of Edinburgh.* (8) So also an individual ratepayer has a good title to question, in an action against the borough magistrates, the legality of employing the ratepayers' money in unauthorized purposes: *Stirling County Council* v. *Magistrates of Falkirk* (9); *Heddle* v. *Magistrates of Leith* (10); *Aitchison* v. *Magistrates of Dunbar.* (11) The function of the Lord Advocate, which differs materially from

(1) (1852) 1 Macq. 65, at p. 75.
(2) (1843) 5 D. 589, at p. 609; reversed on appeal on a different point (1846) 5 Bell's App. 37.
(3) (1859) 22 D. 24, at pp. 29, 30.
(4) (1879) 6 R. 1066; (1882) 7 App. Cas. 547; 9 R. (H. L.) 91.
(5) (1885) 13 R. 358.
(6) (1825) 4 Sh. 276; (2nd ed. 280).
(7) (1842) 5 D. 295.
(8) (1853) 16 D. 86.
(9) 1912 S. C. 1281.
(10) (1897) 24 R. 662, at pp. 664, 666.
(11) (1836) 14 Sh. 421, at p. 426.

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the function of the Attorney-General in England, is exhaustively discussed in *King's Advocate* v. *Lord Douglas*. (1)

Condie Sandeman, K.C., replied.

The House took time for consideration.

Dec. 10. VISCOUNT HALDANE L.C. (2) My Lords, in order to support the decision of the Court of Session the respondents have to establish that two separate questions must be answered in the affirmative. The first of these questions is whether the action complained of, the carrying of passengers by means of the Tay ferries steamers beyond the boundaries of the ferries, as defined by the statute of 1911, was ultra vires of the appellants. The second is whether, if this be so, the respondents have a title and interest such that they are entitled to an interdict. I have arrived at the conclusion that the respondents are entitled to succeed on both of these questions.

As to the first of them, I can express my opinion very shortly. It is now clear that in the case of a corporate body the test is not what was thought by Blackburn J. when, in *Riche* v. *Ashbury Railway Carriage Co.*, in the Exchequer Chamber (3), he laid down as law that a general power of contracting is an incident to a corporation which it requires an indication of intention in the Legislature to take away. It is now well settled by the judgment of this House in the appeal in that case (4), and by subsequent decisions which this House has given, that the answer to the question whether a corporation created by a statute has a particular power depends exclusively on whether that power has been expressly given to it by the statute regulating it, or can be implied from the language used. The question is simply one of construction of language, and not of presumption.

My Lords, if this be so, I am unable to find such power conferred by the statute under consideration in the case before us. It is argued that it is reasonable that the appellants should be entitled to employ their spare steamers in a fashion which

(1) (1836) 15 Sh. 314.
(2) Read by Lord Dunedin.
(3) (1874) L. R. 9 Ex. 224, at p. 264.
(4) (1875) L. R. 7 H. L. 653.

might save wastage and earn money. The answer is that the limits of the ferries, for the service of which the appellants have authority from Parliament to maintain and use these steamers, exclude the region within which they are now claiming to use them. They have, therefore, no power to sail their steamers, as they claim the right to do, in the upper reaches of the Tay.

The circumstance that one of these steamers is normally in reserve, and that it is economically desirable to use it when the business of the ferries does not require it, cannot make what is proposed intra vires. For a power to send excursion steamers beyond the statutory limits within which alone the appellants' steamers are authorized by the statute to sail is not implied in nor is in any sense incidental to a power to sail within limits so defined.

I therefore pass to the second question. This is not simply whether the respondents as mere rival traders are entitled to bring the appellants into Court. For the Act of 1911 gives the respondents an interest of a special kind. From the preamble of that Act it is apparent that Parliament contemplated such a re-incorporation of the harbour trustees as would make them more fully representative of the persons interested in the harbour and commerce of Dundee. The harbour undertaking and also the Tay ferries were transferred to them with this in view. By s. 9 the trustees are incorporated. Sect. 10 provides for their being thirty-three in number, and including four appointed by the shipowners and six by the harbour ratepayers. By s. 19 the electing shipowners are to be British subjects carrying on business in the United Kingdom, and appearing in the books of the Custom House of Dundee as owners to the extent of 100 tons of a vessel registered at that port, or else persons owning vessels in the United Kingdom and having paid rates under the Dundee Harbour Acts amounting to at least 25*l*. The Act goes on to place persons resident within the burgh of Dundee, who have paid rates, exigible under the Harbour Acts, in the same position. Persons coming within these categories may be registered as electors, and may vote at the election of trustees, and be themselves elected.

My Lords, reading the sections together, I think that the effect

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of the statute is to establish a trust, comprising a fund made up of rates, ferry dues, and other sources of income, as well as of sums authorized to be borrowed. I think that the whole undertaking is vested in the corporation created by the statute. By s. 186 and the following sections this undertaking is made to include the Tay ferries. It appears to me that the respondents have an interest as beneficiaries in the fund so constituted and in the undertaking. They have not only contributed as harbour ratepayers, but they have been given certain statutory rights of taking part in the management and control as electors and possible trustees. Their rights are defined and limited by the statute itself, and their interest as beneficiaries under the trust is an interest which belongs to them as members of a class.

I see no reason in point of principle to doubt that this beneficial interest in the trust funds and undertaking which are vested in the appellants as a corporation with limited powers is sufficient to enable the respondents individually to claim to restrain dealings which are ultra vires with the trust funds and undertaking. Of the powers which the harbour trustees possess they appear to me to be trustees for those who are interested in their execution and who have contributed to the funds which they administer. The harbour trustees being a statutory corporation can only execute their powers in the fashion prescribed by the statute incorporating them, and if they exceed the limits which the statute prescribes, I think that any of their beneficiaries may invoke the assistance of the Courts.

In England it may well be that it would be in accordance with the usual and proper practice to invoke in a case such as this the assistance of the Attorney-General, who, as representative of the Sovereign, the parens patriae, has the capacity to interfere. But even without invoking the Attorney-General, I think it probable that in a case such as the present a harbour ratepayer in the position of the respondents, whose interest in the undertaking and funds is apparent, ought to be treated as within the analogy of the principle which enables a single shareholder to sue in his own name to restrain an ultra vires act.

It is not necessary to decide this question of English law, and the judgment in the present case will leave it open; yet I have

thought it right to say what I have in order to show that I do not overlook the analogy. But whatever would be the position in England, the case for recognition of the individual title to sue of a person in the situation of the respondents is materially stronger in Scotland, inasmuch as the Lord Advocate does not, under the law and practice which obtain there, usually intervene as representing the parens patriae excepting when some statute casts on him a duty to do so. I have come to the conclusion that the respondents had a good title to maintain these proceedings.

I have had the advantage of reading the opinion about to be delivered by my noble and learned friend Lord Dunedin, in which he examines this question from the point of view both of principle and of authority, and I concur in the conclusions at which he has arrived. I do not think that the respondents could have made their claim successfully on the mere foundation of injury to their interests as rival traders. It appears to me that their real case is that they are beneficially and individually interested in the administration of property and the execution of powers to be carried out in strict accordance with the terms and limits prescribed by the Act of Parliament under which the incorporated trustees derive their capacity and the respondents their beneficial rights.

For these reasons I move that the appeal be dismissed with costs.

LORD DUNEDIN. My Lords, the appellants act under the powers of the Dundee Harbour and Tay Ferries Consolidation Act, 1911, and by s. 9 of that Act are incorporated under the name of the Trustees of the Harbour of Dundee. Part of their powers and duties consists in the owning and management of the ferries known as the Tay ferries, being the ferries between Dundee, on the north of the river Tay, and Newport and Woodham, on the south of the Tay.

In order to work said ferries (or, in fact, the one to Newport, the other being disused) they are empowered and bound to keep vessels, &c., and obligation is laid upon them of providing for a certain number of crossings per day. In accordance with their

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rights and duty the appellants have provided themselves with three steamers. On several occasions they have used one or other of these steamers which were not actually employed in the exigencies of the ferry traffic for the purpose of conveying excursion parties for pleasure trips on the Tay, such trips extending beyond the limits both of the ferry and of the harbour. The present note of suspension and interdict was presented by the respondents, who are shipowners, against the appellants, and sought to have them interdicted from so employing the steamers belonging to them.

Interdict, as craved, was granted by the Lord Ordinary before whom the case came to depend upon being passed into the Court of Session, and on appeal to the Inner House his Lordship's interlocutor was affirmed by Lords Salvesen and Guthrie, dissentiente Lord Dewar. The ground upon which interdict was granted was that the proceedings complained of were ultra vires of the appellants. The appellants in the pleadings raised two points. They denied that the proceedings in question were ultra vires, and they also objected to the respondents' title to sue.

As regards the question of ultra vires, the opinion of the learned judges in the Courts below was in favour of the respondents, with the exception of that of Lord Dewar. With the finding of the majority I agree, and I do not think it necessary to say more than a few words. The law as to statutory corporations, whether created by a general statute which allows persons acting in accordance with the rules there laid down to procure incorporation for a company, or by a special statute providing by its own provisions for the special incorporation, was authoritatively settled by the case of *Ashbury Railway Carriage Co.* v. *Riche* (1) in this House. The appellants do not dispute that. They concede that a statutory corporation must show that its incorporating document authorizes the acts it purposes to do; but they appeal to the dictum of the Lord Chancellor (Lord Selborne) in *Attorney-General* v. *Great Eastern Ry. Co.* (2) "that whatever may fairly be regarded as incidental to, or consequential upon," the things authorized are not to be

(1) L. R. 7 H. L. 653. (2) 5 App. Cas. 473, at p. 478.

held prohibited by implication. Applying that dictum to the facts of this case, they say the use of the steamers for excursion purposes is incidental to the main purpose of the ferry.

My Lords, this can only be so if "incidental" has such a wide interpretation as this—that any use of plant which brings in money, and so assists the main undertaking, is a use incidental to that undertaking. I cannot so hold. The appellants admit that if they went in for a regular business of excursion contractors that would be ultra vires. "Incidental," in my view, means incidental to the main purposes of the main business, and making excursions with the ferry-boats beyond the limits of the ferry—a proceeding necessarily subjecting the boats to new and different risks from those to which they are subjected in the ordinary ferry business—can never be, in my view, a proceeding incidental to the business of the ferry, just because the money so earned goes into what I may call the ferry coffers.

I turn now to the question of title. The respondents maintained their title on a twofold ground. They said (1.) that they were rival traders, and that the competition of the appellants was injurious to them, as the appellants were enabled to undercut them in prices, and (2.) that they were shipowners and "harbour ratepayers" in the sense of the term as used in ss. 8 and 10 of the appellants' Act. On this matter there was in the Courts below some difference of judicial opinion. The Lord Ordinary held that there was a good title under heading (1.) but not under heading (2.). In the Inner House Lords Salvesen and Guthrie held that the title was good, Lord Dewar that it was bad, under both heads.

In the argument before your Lordships' House the respondents' counsel abandoned his contention under head (1.). I think he was right in doing so. I agree with the judgment of Lord Low on this point in the *Glasgow Steam Packet Case* (1), which is in accordance with the principle given effect to in the *Stockport Case* (2) in England. In the phraseology of Scottish law, when a complainer can only say that he is a rival trader and nothing more, he qualifies an interest but not a title.

By the law of Scotland a litigant, and in particular a pursuer,

(1) 4 S. L. T. 327. (2) 9 Jur. (N.S.) 266.

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must always qualify title and interest. Though the phrase "title to sue" has been a heading under which cases have been collected from at least the time of Morison's Dictionary and Brown's Synopsis, I am not aware that any one of authority has risked a definition of what constitutes title to sue. I am not disposed to do so, but I think it may fairly be said that for a person to have such title he must be a party (using the word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies.

The simplest case of all is where a person is the owner of something. That legal relation of ownership gives him the right to sue all actions which deal with the vindication or defence of his property. Next in simplicity comes contract, where the relation of contract gives the one party a right to insist on the fulfilment of the contract by the other. Generally speaking, persons who are not parties to the contract cannot sue upon it, but this rule suffers exception when there has been created what is known as a jus quaesitum tertio. A well-known instance of this will be found in the right of feuars to enforce building stipulations contained in the titles of other feuars, the law as to which was authoritatively explained by Lord Watson in the well-known case of *Hislop* v. *MacRitchie's Trustees*. (1) This class of case also affords excellent examples of how there may be title without interest, *Gould* v. *McCorquodale* (2), and of the way in which interest will be judged of, *Earl of Zetland* v. *Hislop* (3) and *Mactaggart & Co.* v. *Roemmele*. (4)

It would be useless, even if it were possible, to go on to enumerate in detail the various cases in which a title to sue may be found, so I pass at once to the class of cases which are analogous to the present. If any persons are in such a relation as to constitute them trustees, or if, without being technically trustees, they have a fiduciary duty to others, those persons to whom they owe a fiduciary duty will have a title to sue to prevent the infringement of that duty. Infringement of duty

(1) (1881) 8 R. (H. L.) 95.
(2) (1869) 8 Macph. 165.
(3) (1882) 7 App. Cas. 427; 9 R. (H. L.) 40.
(4) 1907 S. C. 1318.

may consist in wrong dealing with property. These propositions are equally true whether the trustees or quasi-trustees are individuals or voluntary associations or corporations.

Instances of such title to sue having been given effect to are to be found in numberless cases. Thus, for instance, in *Bow* v. *Patrons of Cowan's Hospital* (1) a guild brother was allowed to sue the trustees for reduction of an improper sale of property, his title being rested on the fact that under the trust a charity was to be maintained for decayed guild brethren, and although he had an appointment as one of a committee appointed by all the guild brethren, his title as an individual was affirmed by both Lord Alloway and Lord Justice-Clerk Boyle. In *Rodgers* v. *Incorporation of Tailors of Edinburgh* (2) a widow was allowed to raise the question of the appropriation of funds which would prevent her having the chance of her annuity being increased—a judgment which was practically repeated in *Morrison* v. *Fleshers of Edinburgh*. (3) In *Baird* v. *Magistrates of Dundee* (4) two burgesses were allowed to call the magistrates to account in their capacity as administrators of a mortification fund established for inter alia the educating the sons of poor burgesses. In *Bruce* v. *Aiton* (5) a fisherman who used a harbour was allowed to sue the proprietor of the harbour who levied dues thereon under an Act of Parliament for declarator that the proprietor was bound to keep the harbour lighted.

These cases I have quoted are not at all an exhaustive list, but are to be regarded merely as samples of the various relations in which title to sue has been maintained.

The only difficulty, and in truth the whole argument of the appellants depended upon this, arises out of the decision of this House in Lord Cottenham's time of the case of *Ewing* v. *Glasgow Police Commissioners* (6), and consists not so much in a misunderstanding of the case as in the attempt to make it support a principle which it will not bear. Some preliminary explanation is necessary.

From the time of their creation the Royal burghs in Scotland had possessed lands and other property which were designated

(1) 4 Sh. 276, 2nd ed. 280.
(2) 5 D. 295.
(3) 16 D. 86.
(4) (1865) 4 Macph. 69.
(5) 13 R. 358.
(6) Macl. & Rob. 847

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by the name of the Common Good. The Royal burghs are corporations by Royal charter—it is not material save for accuracy's sake to note that in some cases there were subsequent Acts of Parliament—and the provost and magistrates of these burghs held the common good for the benefit of the inhabitants. The magistrates, however, were left as judges of what was for the good of the inhabitants, and, sometimes from necessity and sometimes from less cogent motives, as time went on much of the common good of the burghs of Scotland was alienated. Indeed, if the state of affairs to-day is taken it will be found that in the case of most of the Royal burghs in Scotland by far the greater part of the common good has been dissipated.

Now it was to be expected that such transactions would be objected to by burgesses who had no part in them, and a good many cases are to be found in the books of attempts to call the magistrates to account. The decisions were conflicting, of which a somewhat naive account may be found in the note in Brown's Synopsis, vol. 1, p. 402, as to the decision in *Lang and Burgesses of Selkirk* v. *The Magistrates* in 1748 (1); "A very elaborate argument, tending to show that private burgesses have neither title nor interest to pursue their magistrates for misapplication of the burgh revenues, is to be found in this case. The Court pronounced opposite judgments; but, before a final decision, the suit was compromised." At last, however, when the time came that the old hearings in praesentia, with the power of presenting unlimited reclaiming petitions, were brought to an end, and the Court divided into two Divisions, consisting of an Outer and an Inner House, and the decisions of the Divisions made final, save as appealable to the House of Lords, the controversy was finally settled by the case of *Burgesses of Inverury* v. *Magistrates* (2), which settled that an individual burgess has no title to call on the magistrates for a general accounting as to the common good.

Then in 1837 came the case of *Ewing* v. *Glasgow Commissioners of Police*. (3) Glasgow had by this time obtained a Police Act, which imposed certain duties on the commissioners estab-

(1) Mor. Dict. 2515. (2) Dec. 14, 1820, F. C.
(3) (1837) 15 Sh. 389.

lished under it and gave powers of assessment. These commissioners opposed a Water Bill promoted by certain water companies in Parliament, and paid the expenses of the opposition out of the funds in their hands. Ewing, a resident in Glasgow, and as such liable to assessment, raised with others a suspension against the commissioners seeking in general terms to have them interdicted from thus applying money raised by assessment. At the same time they raised an action of reduction of the resolutions by which the commissioners had authorized the payment of the money with petitory conclusions attached, ordering them personally to pay back the moneys into the funds of the police establishment.

It is worthy of notice that in the discussions which followed, the Bill of Suspension seems to have got overshadowed by the action of reduction and payment, and got lost sight of. The Court of Session treated the matter somewhat strictly upon the conclusions in the reduction action; and the ground of judgment which sustained a plea of no title to sue is thus put by Lord Medwyn (1): "They (the pursuers) do not seek repetition to themselves, but into the fund. . . . . This is not a question of levying, but of misapplying funds levied for another purpose; and the levy for next year is not objected to." With deference to Lord Medwyn, though this might be said of the conclusions of the reduction, it could not, I think, be properly said of the crave of the Bill of Suspension. The case then came to this House, and was disposed of by Lord Cottenham. The cases cited were entirely the common good cases and none else. The judgment was affirmed, stress being laid on the decision of *Magistrates of Inverury* (2) above mentioned.

Now the underlying view of the common good cases was undoubtedly this, that looking to the origin of the common good, and the wide range of discretion given to the magistrates in its management and application, the Crown, as represented by the Exchequer, could alone institute what one might now call an audit, and that no private burgess could be allowed to do so. Seeing that no such origin could be attributed to funds raised by assessment under a Police Act, and seeing that the Exchequer had never had, or proposed to have, any visitatorial position as to

(1) 15 Sh. 389, at p. 397. (2) Dec. 14, 1820, F.C.

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said funds, (in the Act itself powers of objection were given to specific bodies and persons, and the Court of Exchequer was indicated as the Court before which certain of these objections should be brought,) it is not altogether to be wondered at that doubts had been expressed as to the expediency of the judgment thus pronounced. See Lord Kyllachy in *Conn* v. *Magistrates of Renfrew* (1) and Lord Johnston in *Stirling County Council* v. *Falkirk Magistrates.* (2)

But the decision is a decision of this House of old standing, and cannot as a decision be interfered with. There is, however, no reason to take it as deciding any more than it necessarily decided, i.e., in view of the particular conclusions contained in that action. The appellants, however, wish to extract from that judgment the general proposition that if it is a corporation which commits an act of ultra vires no one can complain except the Crown, unless the act complained of has a direct injurious effect on some patrimonial interest of the complaining party.

My Lords, I think no such proposition can be taken from it, and the strongest argument against it is that the decision has never been so understood by the learned judges of the Court of Session. The case of *Rodgers* (3) already cited was decided within three years of the decision in *Ewing.* (4) Now the interest of the widow in that case was not a direct interest, it was only contingent. In *Baird* v. *Magistrates of Dundee* (5), also cited, the interest was still less direct—it was the case of allowing individual burgesses to compel the magistrates to act up to their fiduciary duties.

Nor were these cases left to stand alone. In *Sanderson* v. *Lees* (6) an individual burgess vindicated the right of the golfers of Musselburgh—he being after all only a potential golfer himself; and lastly in *Grahame* v. *Magistrates of Kirkcaldy* (7) an individual burgess vindicated the right of recreation and bleaching, and Lord Watson in this House upheld his title, while

(1) 8 F. 905.
(2) 1912 S. C. 1281.
(3) 5 D. 295.
(4) Macl. & Rob. 847.
(5) 4 Macph. 69.
(6) 22 D. 24.
(7) 9 R. (H. L.) 91.

pointing out that, in the matter of a general accounting for the common good, the *Magistrates of Inverury Case* (1) was still law. Finally, in the case of *Leith Dock Commissioners* v. *Magistrates of Leith* (2), the Leith Dock Commissioners, in their capacity as ratepayers, presented a suspension against the proposed charging against the public health assessments in Leith of the expenses of unsuccessful parliamentary opposition to a Bill promoted by Edinburgh. Interdict was granted by the Court of Session, and on appeal to this House the appeal was dismissed. (3) It is worth noticing that the suspension in this case is practically indistinguishable from the neglected suspension in *Ewing's Case*. (4) The report does not show it, but I have looked up the pleadings, and I find that no title and no interest were both pleaded by the defenders, and Lord Watson delivered the leading judgment. It is not likely that he had forgotten what he said in *Grahame's Case* (5) as to *Magistrates of Inverury*. (1)

My Lords, the reason for this attitude, I think, is not far to seek. At the time of *Ewing's Case* (4) the doctrine of ultra vires had not been developed as it came afterwards to be, and the point was looked at from the point of view of a title to call to a general accounting. But a somewhat prophetic view may be found, in the opinion of Lord Glenlee, in the case of *Aitchison* v. *Magistrates of Dunbar* (6), decided three years before *Ewing*. (4) The action was brought by burgesses and town councillors against the magistrates to test the legality of an alienation of the burgh property. Lord Glenlee said: "I do not rest on the circumstance that they are members of the town council, but that they complain as burgesses of the illegality of an alienation of the town's property. As the illegality of the act is asserted here I am not disposed to carry too far the distinction between burgesses and town councillors. I am inclined to think that at common law burgesses have an interest and title to look after matters of this sort."

This case was disposed of by Lord Cottenham in *Ewing's Case* (4) by remarking that there was a title in a minority of

(1) Dec. 14, 1820, F. C.
(2) (1897) 25 R. 126.
(3) [1899] A. C. 508; 1 F. (H. L.) 65.
(4) Macl. & Rob. 847.
(5) 9 R. (H. L.) 91.
(6) 14 Sh. 421, at p. 426.

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the town council to challenge an act of the magistrates and council, and that the Lord Justice-Clerk put his opinion on that ground. But while that is true it does not notice the distinction between a calling to account and an objection to a specific act, and while I consider we cannot go back on the judgment in *Magistrates of Inverury* (1), I think it is clear from the latter cases that even if it was a matter of the common good there might be room for distinction between objection to one specific ultra vires act and the general complaint of maladministration. A trace of such a distinction may be found in the old case of *Burgesses of Irvine* (2), mentioned in the argument in *Inverury* (1), but for the reason I have given it was not at that time sufficiently appreciated. The decision in *Magistrates of Leith* (3) was followed in the recent cases of *Stirling County Council* v. *Falkirk Magistrates* (4) and *Farquhar and Gill* v. *Aberdeen Magistrates* (5), in which cases the case of *Ewing* (6) was disinterred and sought to be overpled as here.

My Lords, I have taken no notice of the English authorities on which the appellants found. The question of title to sue in England bristles with difficulties having their origin in the rigid rules of common law actions, with the subsequent modifications of the results of these rules either by statute or by the concomitant working of the equity jurisdiction. This fact makes these authorities of no assistance in Scottish procedure. And further, the Attorney-General, so far as his powers and duties are concerned, has no nearer relation to the Lord Advocate than is contained in the fact that the two officials are dubbed with the common nomenclature of law officers of the Crown. No case in practice has been cited where the Lord Advocate has ever pursued an action of this sort.

I now turn to the circumstances of this case. As I said at the outset, I do not think any general pronouncement can be made as to when there is title and when there is not. But when I find that the respondents in the capacity of harbour ratepayers are

(1) Dec. 14, 1820, F. C.
(2) (1752) Elchies, "Burgh Royal," No. 31.
(3) 25 R. 126.
(4) 1912 S. C. 1281.
(5) 1912 S. C. 1294.
(6) Macl. & Rob. 847.

members of the constituency erected by the Act of Parliament to elect the trustees, and as such are also persons for whose benefit the harbour is kept up, I cannot doubt that they have a title to prevent an ultra vires act of the appellants, which ultra vires act directly affects the property under their care. It is not only that loss of that property through improper acting may have the effect of imposing heavier rates on the respondents in the future, but, in the words of Lord Johnston in the *Stirling County Council Case* (1), as they have contributed to the funds which bought the property, "they have an interest in the administration of a . . . . fund to which they have contributed," and a title flowing from that position and interest.

For these reasons I concur with the motion proposed by the Lord Chancellor.

LORD ATKINSON. My Lords, I have had the pleasure and advantage of reading carefully the judgment which has just been read by my noble and learned friend Lord Dunedin. I concur in it and have nothing to add.

LORD PARMOOR. My Lords, the appellants in this case raised two points. First, that the Acts complained of were not ultra vires, and secondly, that the respondents were not competent parties to proceed against them.

I propose to limit my opinion to the first point. The appellants are the trustees of the Harbour of Dundee and derive their authority from the Dundee harbour and Tay Ferries Consolidated Act, 1911. This Act vests the Tay ferries and certain other ferries and their rights in the trustees, and gives them power to work the ferries and to keep a sufficient number of vessels for that purpose, with an obligation to provide not less than a minimum number of trips between Dundee and the ferry harbour of Newport. The trustees are working the ferries themselves and keep three vessels, which are sufficient for the service of the ferries, but are not all required to be in use at the same time. During 1912 the appellants occasionally let out one of the ferry steamers for excursion parties to points outwith the limits of the

(1) 1912 S. C. 1281, at p. 1293.

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harbour and of the ferries as defined by the Act. It is in respect of this occasional letting out of one of the ferry steamers that the appellants are charged with acting ultra vires.

It is settled law that a body such as the appellants, constituted by statute, have no authority except such as Parliament has conferred upon them, and that they must find a sanction for any powers which they claim to possess in their incorporating statute or statutes. These powers may be expressly authorized or implied as fairly incidental to what is expressly authorized. It is within this border line that the difficulty of definition usually arises. There is no question in the present case of express authority. The appellants are only empowered to use the ferry vessels within geographical limits, and the excursion trips to which exception has been taken are outwith these limits. I think further that the limitation of the powers within geographical limits is in itself sufficient to negative any implication that there is authority to let out their steamers outwith the specified area.

Mr. Younger, in attempting to bring the acts complained of within the statutory authority of the appellants as fairly incidental to their express powers, relied on two arguments, neither of which can, in my opinion, be maintained. He says that the letting of the ferry steamer for excursion purposes outside the statutory area is fairly incidental to the powers expressly conferred on the appellants, in that it enables them to make a profitable use of surplus plant, not in actual use for ferry purposes at the time, but necessary to keep as a stand-by, to ensure that the appellants can fulfil their statutory duties. Unless the convenient or profitable use of surplus plant in itself is sufficient to justify the letting out of the steamers for excursion purposes, such a use of them is in no sense fairly incidental to the exercise of the powers expressly given to work a ferry within a defined area.

I think that the principle that a corporation of limited authority, if it has surplus plant, can use that plant in any way it thinks profitable, so long as such use is not in contravention of its statutory duties, is quite untenable. It makes no difference whether the letting out of the steamers is occasional or such as

to constitute a regular business, since in neither case is there statutory authority, and such authority is the only source from which the right claimed can be derived. The case of *Forrest* v. *Manchester, &c., Ry. Co.* (1) was quoted in favour of the appellants, but the decision in that case has not been followed, and it cannot be accepted as an authority.

The second argument on which Mr. Younger relied was based on a suggested analogy between surplus plant and surplus land, when such land had been acquired for statutory purposes, but was not being wholly used for such purposes. I regard with suspicion any argument founded on analogy; but the answer is that the possession of surplus land does not, any more than the possession of surplus plant, extend the ambit of the powers conferred on a company by statute, and that no company could on such land set up a business, or do any act, which the incorporating statutes had not sanctioned, either expressly or by implication.

The case relied upon was *Foster* v. *London, Chatham and Dover Ry. Co.* (2) In this case the railway company had let the land under the arches, over which the railway was carried on a viaduct, upon short tenancies for shops or business purposes. There was no express statutory sanction or limitation, but it was held that by fair implication the company was authorized to use the land which it had acquired under its statutory powers for any purpose which did not infringe the rights of others, and which were not inconsistent with the purposes for which the company was incorporated. The right of railway companies, as owners of land acquired under statutory powers, to use such land subject to the above limitations gives no support to the proposition that surplus plant, when not in actual use for statutory purposes, may be used for any profitable purpose which the corporation may think fit, irrespective of either the rights conferred, or the limitations imposed, by the incorporating statute or statutes.

My Lords, on the second point, which is a question of Scottish procedure, I concur in the opinion expressed by Lord Dunedin. The position of the Attorney-General in England differs so materially from that of the Lord Advocate in Scotland that it is

(1) 30 Beav. 40. (2) [1895] 1 Q. B. 711.

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difficult to apply the English precedents to the conditions which prevail in Scotland. Should a similar case arise in England I reserve my judgment. In my opinion the appeal should be dismissed with costs.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Lords' Journals, December 10, 1914.

Agents for appellants: *Beveridge, Greig & Co., for J. K. & W. P. Lindsay, W.S., Edinburgh.*

Agents for respondents: *Thompsons, Quarrell & Jones, for Maxwell, Gill & Pringle, W.S., Edinburgh.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES (AT THE RELATION OF A. A. COCKS AND OTHERS) . . . . . APPELLANT;

AND

J. L. WILLIAMS . . . . . RESPONDENT.

J. C.*
1914
Nov. 9, 10.
1915
Jan. 24.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

New South Wales—Crown Lands—Governor's Residence—Authority of State Executive—"Waste Lands"—Parties—Capacity of Attorney-General for State—New South Wales Constitution Act, 1855 (18 & 19 *Vict. c.* 54), *s.* 2.

Government House, Sydney, was built upon Crown land about 1845 as a residence for the Governor of New South Wales, and, with the stables of a former residence, was continuously so used until 1900. From 1900 to 1912, by an arrangement between the Governments of the Commonwealth and of the State, the premises were occupied by the Governor-General, and another residence was provided for the Governor of the State. In 1912, this arrangement having come to an end, the State Government threw the grounds attached to the house open to the public and took steps to convert the stables into a school of music. By the New South Wales Constitution Act, 1855, s. 2, all "waste lands" in the then Colony were placed under the control of the local Legislature. The Attorney-General for New South Wales, at the relation of residents in the State, filed an information praying for declarations that the house and grounds were vested in His Majesty, dedicated to the public purpose of a residence for the Sovereign's representative in New South Wales, and that neither the Governor of New South Wales nor the Governor in Council had power to interfere with or alter that purpose, and for an injunction restraining the respondent (as representing the State Government and ministers) from otherwise using the house and grounds:—

Held, that the suit was not maintainable, since no trust had been declared or charity established, and the action complained of was that of the State Executive and within its competence, whether the house and grounds were "waste lands" within the above section or not.

Held, further, that the proceedings were not properly constituted since it was claimed that the right of administration of the premises was in the Crown in the right of the United Kingdom, but the Crown in that right was not represented before the Courts.

APPEAL by special leave from a decree of the High Court of Australia (June 19, 1913) reversing a decree of the Supreme Court of New South Wales (March 20, 1913).

* *Present:* VISCOUNT HALDANE L.C., LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, LORD SUMNER, and SIR JOSHUA WILLIAMS.

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The suit was instituted by information filed in the Supreme Court of New South Wales (in Equity) by the Attorney-General of New South Wales, at the relation of three citizens, against the respondent as nominal defendant representing the Government of the State under the Claims against the Government and Crown Suits Act, 1912 (No. 27 of 1912 of New South Wales). By the prayer of the information the Attorney-General asked for (1.) a declaration that Government House, Sydney, and the grounds attached to it were "vested in His Majesty, dedicated to the public purpose of a residence for the Sovereign's representative in New South Wales"; (2.) a declaration that "neither the Government of New South Wales nor the Governor in Council has power to interfere with or alter the said purpose to which the said house and grounds were dedicated"; (3.) an injunction restraining the respondent as nominal defendant on behalf of the Government of New South Wales, the ministers, officers, and servants of the Crown, "from using or causing or allowing to be used the said house and grounds for any purpose other than the public purpose of a residence for the Sovereign's representative in New South Wales."

The land on which Government House stands originally formed part of a larger area which was marked out about 1792 by Governor Phillip (the first Governor of New South Wales) upon a map of Sydney and described thereon by him as "for the use of the Crown and as common lands for the inhabitants of Sydney." This area was afterwards known as "the Government domain." In 1810 Governor Macquarie appropriated part of the domain for the erection of a hospital, and in 1816 a further part for botanical gardens. The same Governor, about 1817, erected within the domain a Gothic building which was used by him and subsequent Governors for the purpose of stabling and still exists. After communications between successive Governors and Secretaries of State for the Colonies, authority was given by the Secretary of State in 1835 for the building of the present Government House and the enclosure therewith of forty-seven acres of the Government domain. The building was completed in 1845, the Legislative Council having voted 10,000*l.* towards its erection and 15,000*l.* being provided by the sale of

part of the domain. From 1845 to 1900 the premises were occupied by successive Governors of New South Wales. The land attached to the house had been reduced to about thirty-five acres by the appropriation of parts of it from time to time for public purposes.

After the establishment of the Commonwealth in 1900, the Government of New South Wales arranged to lease Government House to the Commonwealth Government for the use of the Governor-General and provided another residence for the Governor of New South Wales. This lease came to an end in 1912, and the State Government decided to throw the grounds open to the public as part of the adjoining botanical gardens, and to convert the stables into a conservatorium of music. The Premier of New South Wales attended and declared the grounds open to the public. The State Government caused the fences, which separated the grounds from the adjoining public gardens, to be removed, made paths, and set up notice boards; it also prepared plans and took other steps for the conversion of the stables as above mentioned, and placed a sum of 4000*l.* in the public estimates for that purpose.

The appellant gave notice of motion for an injunction which was by consent treated as a motion for a decree.

The Supreme Court, consisting of the Chief Justice (Sir William Cullen) with Simpson and Street JJ., pronounced a decree declaring that the house and grounds "are vested in His Majesty the King, dedicated to the purpose of a residence of His Majesty's representative in New South Wales; and that the action or concurrence of His Majesty's Imperial Government is necessary to divert the same from such purpose." The Court also restrained the defendant in his representative capacity from any unauthorized interference with that purpose.

The High Court of Australia (Barton A.C.J. and Isaacs, Higgins, Duffy, Rich, and Powers JJ.) reversed the above decision and dismissed the suit.

The Acting Chief Justice held that there was a fatal defect in the suit in that the appellant was claiming that the house and grounds in question were vested in His Majesty in the right of the Crown of the United Kingdom, but that the informant

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represented only the right of the Crown as parens patriae in New South Wales and not in respect of an imperial right. He was also of opinion that the expression "waste lands" as used in the New South Wales Constitution Act, 1855, was not to be construed according to the definitions contained in the Australian Waste Lands Acts of 1842 and 1846 (5 & 6 Vict. c. 36 and 9 & 10 Vict. c. 104), but meant such land as the Crown had not made the subject of a proprietary right of any citizen. He accordingly held that the house and lands were "waste lands" within the meaning of the Constitution Act, 1855, and by s. 2 of that Act under the control of the local Legislature. In his opinion the people of New South Wales had not any beneficial right or interest in the house and grounds, and if the view that they were "waste lands" was wrong, they fell under the control of the local Legislature by virtue of s. 1 of the Act of 1855, enabling that Legislature to make laws for the peace, welfare, and good government of the Colony in all cases whatsoever.

Isaacs J. and Higgins J. delivered separate judgments, and Duffy and Rich JJ. a joint judgment, substantially to the same effect. Powers J. concurred.

The proceedings in the High Court are reported at 16 C. L. R. 404, and those in the Supreme Court of New South Wales at 13 S. R. (N. S. W.) 295.

P. O. Lawrence, K.C., and *Alfred Adams*, for the appellant. The house and grounds were before and at the time of the passing of the Constitution Act, 1855 (18 & 19 Vict. c. 54), vested in Her Majesty, dedicated and set apart for the public purpose of a residence for the Sovereign's representative, and no statute has since been passed or act done by virtue of which they can be lawfully diverted from that purpose. Even if there was no dedication to the public in the sense applicable to a highway, or no charity established, the public of New South Wales has sufficient interest in the matter to support the suit. The house and grounds are not "waste lands" within the meaning of s. 2 of the Constitution Act, 1855, so as to be under the control of the local Legislature. The expression "waste lands" is not defined by

that Act and it should receive the same meaning as is assigned to it by the Australian Waste Lands Acts, 1842 and 1846 (5 & 6 Vict. c. 36 and 9 & 10 Vict. c. 104). Although those Acts were repealed by 18 & 19 Vict. c. 56 they are referred to and dealt with in the Constitution Act, 1855. The house and grounds being dedicated and set apart for a public use are excluded both from the definition contained in s. 23 of the Act of 1842 and from that in s. 9 of the Act of 1846. Apart from those definitions it is contrary to the ordinary use of language to treat the house and grounds in question as "waste lands." The general power to legislate for the peace, welfare, and good government of the Colony, contained in s. 1 of the Constitution Act, 1855, cannot apply, for if it does s. 43 of the scheduled Act giving power to legislate as to "waste lands" was not needed. If, however, the house and grounds were under the control of the local Legislature, no legislative act has been passed dealing with the matter. In the similar case of the Paramatta domain the Paramatta Domain Act, 1857 (20 Vict. No. 35 of New South Wales), was passed. The view of the High Court that the right claimed was a right of the Crown in its imperial aspect, and that the Attorney-General for the State could not maintain the suit, is erroneous. The Attorney-General for the State is the proper person to proceed in the State Courts to redress a wrong affecting Crown lands in the State. There is no precedent for the Attorney-General for England appearing in a Colonial Court. There is abundant authority that the King in different capacities can be both plaintiff and defendant in a suit. [*Farnell* v. *Bowman* (1), 9 Geo. 4, c. 83, s. 20, and 5 & 6 Vict. c. 76, s. 29, were also referred to.]

Sir R. Finlay, K.C., *Austen-Cartmell*, and *F. L. V. Coffey*, for the respondents, were not called upon.

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Jan. 24.

The judgment of their Lordships was delivered by

Lord Sumner. Government House, Sydney, stands in extensive grounds on Sydney Harbour, between Sydney Cove and Farm Cove. It was built about seventy years ago, and down to the end of the last century was always used as the official residence of the Governor of New South Wales. It

(1) (1887) 12 App. Cas. 643.

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replaced an earlier Governor's residence, the stabling of which alone survives, "consisting of a mass of modern Gothic buildings"—the Gothic of 1817—"built by Governor Macquarie on a handsome scale." It was built at the instance of the Governor for the time being for the use of himself and his successors. In this sense, and in this only, has it been "appropriated" to the use of the Governors of New South Wales. At no time had members of the public any right to use it. They visited it as his Excellency's guests, or resorted to it on business connected with his office, but it was always his personal residence, and was as private as is possible in the case of a person holding so eminent an office. It was a public building on a public domain only in the sense that the property was in the Crown, and the Crown granted the use of it to a public official.

In 1900, after the passing of the Commonwealth Act, by an arrangement made between the Government of the Commonwealth of Australia and the Government of New South Wales, the house and grounds were occupied by his Excellency the Governor-General of the Commonwealth as his Sydney residence, another house at Sydney being provided by the Government of New South Wales as the residence of the Governor of the State. This arrangement was terminated in 1912, and Government House became untenanted. At the end of the year, after some trifling alterations such as the removal of sentry boxes and fences and the provision of notice boards and paths, the grounds were thrown open to the public, the Premier of New South Wales attending and making a public announcement to this effect. No change was made in the house, but the public was admitted to see the ground floor twice a week. For all that appears what was done was temporary and, if the present house of the Governor of the State were disposed of, he might resume residence in the dwelling of so many of his predecessors. In the stables, however, more extensive alterations were decided upon; the buildings were to become a conservatorium or school of music.

It was in these circumstances that the appellant, the Attorney-General of New South Wales, on the relation of sundry private persons, filed the present information praying declarations that

"the said house and grounds are vested in His Majesty the King, dedicated to the public purpose of a residence for the Sovereign's representative in New South Wales," and that "neither the Governor of New South Wales nor the Governor in Council has power to interfere with or alter the said purpose to which the said house and grounds are dedicated," and asking for an injunction against the defendant (who had been duly nominated under the Claims against the Government and Crown Suits Act, 1912), as representing the Government of New South Wales, the ministers, officers, and servants of the Crown, from using the house and grounds otherwise than in accordance with such declarations. The evidence that the Government of New South Wales threatened and intended to act in substantial contravention of such declaration was inconsiderable, but their Lordships do not stay to observe upon this. It satisfied the Supreme Court of New South Wales, which unanimously granted the declarations and the injunction. The High Court of the Commonwealth unanimously discharged them. The question to be decided is a question of right; the respondent does not contest that, failing any right, those whom he represents have, in some and a sufficient degree, formed and acted upon an intention not consistent with the terms of the declarations.

The appellant's case originally was that the premises in question had been affected by something in the nature of a declaration of trust. They were said to have been "dedicated to public use," and when it became apparent that the case was not one of dedication in the proper sense of the term, and that no highways across the premises had been dedicated at all, it was said that the grounds of Government House had been "appropriated to the use of the public." This vague term, more consistent with a bare temporary permission or a revocable licence than with anything which could be the foundation of a definite permanent right, became eventually the symbol of something supposed to be in the nature of a charitable trust, and thus it was that the commencement of proceedings in the name of the Attorney-General on behalf of the Crown was justified.

Their Lordships are in entire accord with the High Court of

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the Commonwealth in thinking that no such case was made out and that no trust was declared and no charity established. It would be superfluous to add to the reasons with which this conclusion was supported in the cogent judgments delivered in the Court below.

It is admitted that the property in the premises in question is vested in the Crown, and thus Courts of law have been asked to pass judgment upon the use which ministers of the Crown are making of Crown property. No private person, natural or corporate, has any civil right therein, and the complaint is no more private than that which any member of the public may make, on what he deems to be public and patriotic grounds, against the conduct of an administration in relation to what is popularly called "public property." It is evident that the appellant is at once faced with many difficulties, not all of which need to be discussed now. Their Lordships feel, as the High Court of the Commonwealth felt, that the action is defectively constituted. The Attorney-General of New South Wales proceeds against a subordinate of his own, the representative defendant above mentioned, but if, as is contended, not only the property but the right of administration of these premises is in the Crown in right of the United Kingdom, no one appears before the Courts to watch its rights or to state whether or no what has been done is or is not authorized or ratified by His Majesty on the advice of his ministers. This defect, though formal, is grave, for their Lordships cannot in such a matter supply the deficiency by inference, or by information of less than the highest authority. They agree with the High Court that the proceedings as constituted are incompetent, but they agree also that it is better not to dispose of a case, which has attracted some public concern, merely on this formal ground.

When first the grounds of Government House were marked out and the house was built, it was by the Governor of New South Wales that they were administered, in correspondence with and under responsibility to the Secretary of State. Accordingly the area of the grounds was diminished from time to time. The house itself was always occupied by the Governor as one of his residences, but under directions from the Secretary of

State it might doubtless have been used for other purposes. In due time an Executive Council was established, upon whose advice the Governor performed various executive acts. After the Constitution Act of 1855 came into force, the Executive was the Governor acting upon the advice of ministers. It has been much questioned whether Government House and its grounds were "waste lands" within 18 & 19 Vict. c. 54, s. 2, so that the management and control of them passed to New South Wales thereby, but in their Lordships' opinion it is not necessary to decide the point. If the premises are "waste lands," there is nothing to show that what has been done has been done otherwise than in the strictest accordance with constitutional usage. Whatever jurisdiction there may be in certain events to consider judicially the effect of ministerial acts when a Governor is not in accord with ministers, or of a Governor's acts if ministers have not advised them, no question of invoking such jurisdiction arises here.

Equally, if Government House remains outside of the operation of 18 & 19 Vict. c. 54, the Governor is entitled to have ministerial assistance both in the way of consultation and of executive action. Their Lordships agree with Isaacs J., that "the absence of what has been called 'executive authority' for the determination of ministers to apply the land to the new purposes" is not material in the present proceedings. It cannot be said, saving always the rights of the Crown of the United Kingdom, that anything illegal or even irregular has been done qua the people of New South Wales if the Governor has exercised his authority, as the officer of the Crown, in respect of property held by the Crown in right of the United Kingdom, upon the advice and by the ministration of the Ministry of New South Wales. There is nothing which requires him to act in such a matter by a solitary determination or by his own single effort. Though the personal intervention of the Governor is not shown in the present case, and even if it be assumed that it was absent, the action taken is that of the Executive and is within its competence on either hypothesis as to the construction of the Constitution Act. No question arises of any obligation on the part of the Governor to take or to abide by the advice of the Ministry of New South

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Wales, assuming the premises in question not to have been "waste lands" within 18 & 19 Vict. c. 54. It therefore appears to their Lordships that the appellant fails in limine, for nothing that has been done is shown to have been ultra vires or irregular.

It was indeed contended that this property could not be disposed of without some legislative act, and that none such is shown or suggested to have taken place. Their Lordships think that this point, which does not appear to have been raised in the Courts below, has been taken under a misapprehension. The argument refers to permanent dispositions, alienations, or the like. Here, on the evidence, nothing irrevocable has been done. The railings and sentry boxes can be restored, and the public can be excluded from the grounds. The professors can be dispersed from the conservatoire, and the horses brought back to their stables. There may be some disappointment and even discontent, and some expense more or less considerable, but if, when the lease of the Governor's present residence expires, it should be decided that he should once more occupy the house of his predecessors, it does not appear that there has been any disposition or irrevocable change to prevent it.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and the appellant will pay the costs.

Solicitors for appellant: *Crawford, Chester & Slade.*
Solicitors for respondent: *Light & Fulton.*

[PRIVY COUNCIL.]

MINISTER FOR LANDS . . . . . APPELLANT.

AND

GEORGE COOTE . . . . . RESPONDENT.

J. C.*
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Feb. 8, 25.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Crown Lands—Homestead Grant—Conversion into Conditional Purchase—Term of Residence—Crown Lands (Amendment) Act, 1908 (*No.* 30 *of* 1908), *s.* 3, *sub-s.* 3.

Upon the conversion of a homestead selection or grant into a conditional purchase under s. 3 of the Crown Lands (Amendment) Act, 1908, of New South Wales, the period of continuous residence upon the homestead selection or grant by which the term of residence mentioned in sub-s. 3 (*c*) of the above section is to be reduced is limited to the period during which the applicant has himself continuously resided upon the selection or grant, and does not include the period during which the applicant's predecessors in title have so resided.

APPEAL from an Order of the Supreme Court of New South Wales (February 24, 1914), upon a special case stated by the Land Appeal Court under the Crown Lands Consolidation Act, 1913 (No. 7 of 1913), s. 22, sub-s. 5.

The questions submitted to the Supreme Court by the special case were four in number, but may be summarized as follows:—Whether, upon the conversion of a homestead selection or grant into a conditional purchase under s. 3 of the Crown Lands (Amendment) Act, 1908, the period of continuous residence upon the homestead selection or grant by which the term of residence mentioned in sub-s. 3 of that section is to be reduced is limited to the period during which the applicant for the conversion has himself continuously resided upon the homestead selection or grant, or includes the periods during which any and which of his predecessors in title have so resided.

The facts and the relevant statutory enactments appear from the judgment of their Lordships.

* *Present:* LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, SIR GEORGE FARWELL, and SIR ARTHUR CHANNELL.

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The Supreme Court (Pring, Gavan Duffy, and Powers JJ.) held that the term "applicant" in sub-s. 3, above referred to, included predecessors in title of the person who actually applies for conversion under the section. The learned judges considered themselves bound so to hold by the decision of the High Court of Australia in *Walsh* v. *Alexander*. (1)

Sir R. Finlay, K.C., and *Austen-Cartmell*, for the appellant. The language of s. 3, sub-s. 3, of the Act of 1908 is clear, and there is no valid ground for interpolating the words "or his predecessors in title" after the word "applicant." The applicant by conversion gets rid of the perpetual condition as to continuous residence by himself, his heirs or assigns, which attaches to a homestead grant; it is therefore a reasonable view that the Legislature intended that the applicant should have himself performed the continuous residence for which he is to receive credit under the sub-section. The question in *Walsh* v. *Alexander* (1) was whether the contract there in dispute was illegal. The present question did not necessarily arise, and so far as the judgments deal with it they are obiter. The view that the word "applicant" in sub-s. 3 must receive the same meaning as the same word has in s. 17 of the Crown Lands Act, 1895, is untenable. The applicant referred to in that section is a person applying for a homestead grant, and not a person applying to convert a homestead grant into a conditional purchase. [Crown Lands Act, 1884, ss. 21, 26, 32, 34, 35, 36, 40, 117, 121, 122, 125; Crown Lands Act, 1889, ss. 21, 22, 24; Crown Lands Act, 1895, ss. 13 to 17 (inclusive), 20, 21, 23, 29, 42, 43; Crown Lands Amendment Act, 1903, ss. 8, 10; Crown Lands (Amendment) Act, 1908, ss. 3, 4, 8, 25; and *In re Milne* (2) were referred to.]

The respondent did not appear.

1915
Feb. 25.

The judgment of their Lordships was delivered by

LORD DUNEDIN. This is an appeal by the Minister for Lands in New South Wales against the judgment of the Supreme Court of New South Wales given on a special case stated by the Land

(1) (1913) 16 C. L. R. 293. (2) (1912) 12 S. R. (N. S. W.) 299.

Appeal Court. The circumstances out of which the matter arises are as follows. On February 14, 1901, one Henry Wilkinson applied for a homestead selection of a plot of land situated in the land district of Tamworth, which was duly confirmed on March 11 following, and on August 25, 1906, a homestead grant was issued in respect of the said selection. On January 21, 1908, the homestead grant was transferred by Wilkinson to one Marshall, and was by him transferred to the respondent George Coote on August 15, 1910. On January 7, 1911, the respondent applied under the provisions of the Crown Lands (Amendment) Act, 1908, to convert the said homestead grant into an original conditional purchase, and the application was confirmed on March 8 following. On April 16, 1913, the respondent applied to the Local Land Board for a certificate that all the conditions applicable to the said conditional purchase, except payment of the balance of the purchase-money, had been fulfilled, and the Board directed that such certificate should be issued to him. In so doing they considered it proved that Wilkinson, Marshall, and the respondent had all been in residence on the land during their successive terms of occupation. The Minister for Lands referred the determination of the Local Land Board to the Land Appeal Court for re-hearing and further consideration, upon the ground that the respondent was not entitled to have the said certificate issued to him, inasmuch as he had not fulfilled the condition of residence in respect of conditional purchase required by s. 3, sub-s. 3 (*c*), of the Crown Lands (Amendment) Act, 1908. The Land Appeal Court dismissed the reference, whereupon the appellant requested the Land Appeal Court to state a case for the decision of the Supreme Court upon certain points of law. The points of law in the case are put in four questions, but only one question, namely, question 3, need be noticed, as an answer to that question virtually answers all the others. The said question 3 was as follows: "Whether for the purpose of the provision for the reduction of residence in s. 3 of the Crown Lands (Amendment) Act, 1908, the term 'applicant' includes predecessors in title by successive transfers of the person who actually applies for the conversion under the said Act?"

The Court answered the question in the affirmative, and

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dismissed the appeal, holding themselves bound by the decision of the High Court of Australia in the case of *Walsh* v. *Alexander* (1) and giving no further reasons. The case of *Walsh* v. *Alexander* (1) did not of necessity raise the question of the proper interpretation of s. 3 of the Act cited. It was an action for specific performance of a contract, and judgment in favour of the plaintiff might have been given or refused without considering the interpretation of that section. But undoubtedly the learned judges who decided that case did so upon an interpretation of s. 3, and their Lordships are of opinion that the Court in this case was right in holding itself bound by that decision. The interpretation given in that case is not, however, binding upon their Lordships, and they have been invited by the appellant, the Minister for Lands, in this case to consider whether it is sound. Their Lordships regret that they have not had the benefit of any appearance to support the judgment, but they have very carefully considered the matter on its merits, as the question is an important one, and they put upon the appellant the onus of showing that the interpretation given in *Walsh* v. *Alexander* (1) was wrong.

Conditional land purchase is first dealt with in the Crown Lands Act, 1884, under Part III. of that Act. The general scheme of conditional purchase is to give an approved applicant possession of the holding for which he applies, and to allow him to pay for the land by instalments. It is not necessary to recite at length the various sections which prescribe the methods which are necessary to be employed in order that a person may obtain a conditional purchase. After laying down conditions as to what lands may be applied for and who may apply, s. 32 provides as follows: "Every original conditional purchaser under this Act shall within three months from the date of confirmation of his application by the Local Land Board commence and thereafter continue to reside on his conditionally purchased land for the term of five years from such date." Sect. 36 provides: "If at the expiration of the prescribed term of residence the Local Land Board shall be satisfied, after due enquiry, that all conditions applicable to a conditional

(1) 16 C. L. R. 293.

purchase, except that of payment of the balance of instalments, have been duly complied with, such Board shall issue a certificate to that effect."

By the Crown Lands Act, 1895, Part IV., s. 29, the condition of residence was for all grants after its date increased to ten years, and it was provided by sub-s. (*c*): "The Local Government Board shall hold inquiries after the expiration of five and ten years from the date of the application whether all conditions applicable to the conditional purchase, except payment of balance of instalments have so far been duly complied with, and if the Board be satisfied of such compliance it shall issue certificates to that effect." Sub-s. (*d*) provided: "The conditional purchase may be transferred at any time after the issue of the first certificate, and shall not be transferred before the issue thereof, and the grant shall not be issued before the issue of the second certificate."

So far as to the purchase scheme. But by Part III. of the same Act of 1895 provisions were made for applications for homestead selections to be afterwards converted into homestead grants. By s. 15 certain conditions applicable to all grants are set forth, of which one is as follows: "(*c*) He" (that is the applicant) "shall, within three months after the confirmation of his application, commence to live upon the homestead selection, and shall continue to have his home and place of abode there until the issue of the grant." Then by s. 17, which provides for the issue of the grant, it is provided that a homestead grant shall contain provisions for (*a*) the payment by the grantee, his heirs and assigns, of a perpetual rent, and (*b*) the performance by the grantee, his heirs and assigns for ever, of an obligation to live upon the homestead selection, being his or their home or place of abode, to which there is added a forfeiture if these conditions are not complied with.

These two tenures are therefore quite definite tenures. The latter is a perpetual occupation lease, residence being of the essence of the right whether the lands are in the hands of the original holder or of his successors; the former is a method of acquiring property, residence for a certain time being a condition

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of the acquisition, to cease as the condition is performed, and, once complied with, never affecting the original holder afterwards, or the transferees in whom after compliance the property may become vested by the transferors.

Then comes the Crown Lands (Amendment) Act, 1908, and this for the first time provided means for the conversion of a homestead grant into a conditional purchase. This is effected by the provisions of s. 3, sub-s. 3 of which is as follows: "The conditional purchase . . . . shall be subject . . . . (*b*) to the general provisions of the principal Acts relating to the class of holding into which the homestead selection or grant is converted, except that (*c*) the term of residence shall commence on the date of the Board's confirmation of the conversion, but shall be reduced by the period during which continuous residence has been performed by the applicant upon the homestead selection or grant up to and immediately preceding the date of such confirmation: . . . ."

In their Lordships' opinion this section is clear and unambiguous. It begins by subjecting the person who wishes to convert to the usual condition which affects anyone who obtains a conditional purchase, to wit, ten years' residence, but this condition is, so to speak, alleviated by permitting a certain deduction. That deduction is of the continuous residence which has been performed by the applicant. Now the applicant can only mean the man who applies, and, with deference to the learned judges who decided otherwise, their Lordships think it is impossible to find room for any construction of the word except its natural meaning. In particular it is quite inadmissible to argue that because in the Act of 1895 certain provisions applied to the transferees of the original applicant for a homestead grant as well as to the original applicant himself, it follows that the word "applicant" in s. 3 of the Act of 1908 must include the predecessors in title of him who makes the application. A simple answer to this argument is that the applicant in one case is the applicant for one thing, and the applicant in the other case is the applicant for another, and that the fact that in one sort of tenure conditions imposed on one sort of applicant are continued upon his transferees does not lead to any logical conclusion that

conditions imposed upon the applicant for another sort of tenure may be held as fulfilled by the performance by those who were transferors in a tenure which he is applying to abandon. With the policy of the statutes their Lordships have no concern. The words are so plain as not to admit of any interpretation save the natural meaning, and consequently a residence performed by the applicant must, in their Lordships' judgment, mean residence by the man who applies for the conversion, and not by any one else. If this result is contrary to an enlightened policy—a point on which their Lordships neither express nor form an opinion—it is easy indeed for the Legislature to change it by amending the section in question.

Their Lordships are, therefore, of opinion that the appeal should be allowed, and the questions in the special case answered in the negative. The respondent should repay any costs paid to him under the order of the Court below. As this is a test case of general importance, their Lordships are of opinion that no costs should be given to either party in the Court below, and there will be no costs of this appeal. And their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Light & Fulton.*

[PRIVY COUNCIL.]

J. C.* 1914 Dec. 1. 1915 Jan. 20.

TORONTO SUBURBAN RAILWAY COMPANY Appellants;

AND

CORPORATION OF THE CITY OF TORONTO Respondents.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada (Ontario)—Street Railway—Repair of Roadway—Agreement with Municipality—"Keep clean and in proper repair"—New Paving—"Tracks"—Ontario Railway and Municipal Board Amendment Act, 1910 (10 *Edw.* 7, *c.* 83, *Ontario*), *s.* 3.

Under an agreement made in 1899 with the municipality, the appellants operated a street railway along certain streets in Toronto. Clause 6 of the agreement provided that the appellants should "keep clean and in proper repair that portion of the travelled road between the rails and for eighteen inches on either side thereof." Under s. 3 of the Ontario Railway and Municipal Board Amendment Act, 1910, that Board has power to direct any railway company to make repairs, improvements, or changes in any (inter alia) "tracks" used by it in or in connection with the transportation of passengers, freight, or property:—

Held, (1.) that the word "tracks" in s. 3 above referred to did not include the roadway between the rails, and that the Board had no jurisdiction under the above section to order the appellants to pave that part of a road used by the railway; (2.) that the obligation imposed upon the appellants by the agreement did not extend to the doing of works which would give the roadway between the rails a new character.

Appeal from a judgment of the Appellate Division of the Supreme Court of Ontario (June 4, 1913) affirming, subject to a variation, an order of the Ontario Railway and Municipal Board (June 25, 1912).

The appellants were a railway company incorporated with statutory powers, and under an agreement dated September 4, 1899, and subsequently confirmed by statute, they operated a street railway along certain highways in Toronto, including Bathurst Street and Davenport Road.

* *Present:* Viscount Haldane L.C., Lord Dunedin, Lord Parker of Waddington, Lord Sumner, and Sir Joshua Williams.

Clause 6 of the above agreement provided : "The company shall, where the rails are laid upon the travelled portion of the road, keep clean and in proper repair that portion of the travelled road between the rails, and for eighteen inches on each side of the rail or rails lying on or being next to the travelled road, and in default the township may cause the same to be done at the expense and proper cost of the company."

The Ontario Railway and Municipal Board was constituted by the Ontario Railway and Municipal Board Act, 1906 (6 Edw. 7, c. 31, Ontario), and by s. 16 (*a*) of that Act the Board has power to enforce upon any railway company its duties under any agreement with a municipality.

By s. 3 of the Ontario Railway and Municipal Board Amendment Act, 1910 (10 Edw. 7, c. 83), the Board has power to direct any railway company to make repairs, improvements, or changes in any (inter alia) "tracks" used by it in or in connection with the transportation of passengers, freight, or property. The terms of the section are more fully stated in their Lordships' judgment.

At the time when the above agreement was entered into Bathurst Street and Davenport Road were not paved. In 1912, owing to the increase of traffic along those highways and to their disrepair, the respondents desired that they should be paved with blocks.

Upon the application of the respondents, the Board, on June 25, 1912, made an order ordering the appellants to put in a proper and sufficient state of repair its tracks and sub-structures in Bathurst Street and Davenport Road and directing them "to dig out and pave that part of the roadway used for railway purposes and eighteen inches on either side thereof." The order further provided that, in case of difference as to the kind of pavement to be put down, the matter should be determined by the Board's engineer.

The Appellate Division of the Supreme Court (Meredith C.J.O. with Maclaren, Magee, and Hodgins JJ.A.) remitted the matter to the Board to determine the kind of pavement to be used, being of opinion that the Board could not delegate its powers to its engineer, but declared that the Board had jurisdiction to order the appellants to pave the streets in

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question with such material as the Board might order, and further declared that upon the true construction of s. 3 of the Ontario Railway and Municipal Board Amendment Act, 1910, the word "tracks" as therein used included "all that part of any roadway occupied by the said railway company (the appellants)."

The proceedings before the Appellate Division are reported at 29 Ont. L. R. 105.

Clauson, K.C., Tyrrell Paine, and *R. B. Henderson,* for the appellants. Clause 6 of the agreement with the municipality imposes no duty upon the appellants to reconstruct the part of the roadway to which it refers. If the respondents desire to have a pavement of a new kind in the streets in question it is for them to lay it and they have power under clause 17 to lay it upon that part of the roadway used by the railway; when it has been laid the duties of the appellants under clause 6 arise with reference to the part referred to. A statutory obligation to bear part of the cost of "maintenance" of a highway does not extend to the cost of reconstruction: *Leek Improvement Commissioners* v. *Justices of Stafford.* (1) So too a covenant to maintain a highway must be construed not only having regard to its general condition, but to its nature as originally constructed: *Scott* v. *Brown.* (2)

[LORD SUMNER referred to *Lurcott* v. *Wakely & Wheeler* (3) and *Lister* v. *Lane.* (4)]

The Appellate Division was much influenced by the decision in *Mayor of New York* v. *Harlem Bridge Ry. Co.* (5), but the language in that case was different, the words being "good and proper order and repair." [*Attorney-General* v. *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* (6) was also referred to.]

The context in s. 3 of the Ontario Railway and Municipal Board Act, 1910, shows that the word "tracks" as there used does not include or mean the part of the roadway between the rails,

(1) (1888) 20 Q. B. D. 794.
(2) (1903) 68 J. P. 181.
(3) [1911] 1 K. B. 905.
(4) [1893] 2 Q. B. 212.
(5) (1906) 186 N. Y. 304.
(6) [1914] 3 K. B. 1.

but merely the rails and ties. Both the agreement and the Act, in various clauses and sections, draw a distinction between "roadway," "tracks," and "rails." If the jurisdiction of the Board to make the order arose solely under s. 3 and not under the agreement there was no power to extend its operation to eighteen inches on each side of the rails. By s. 220 of the Ontario Railway Act, 1906 (6 Edw. 7, c. 30), the Board has no power to vary or rescind an agreement between a railway company and a municipality; the jurisdiction of the Board to make the order must therefore be found either under the terms of the agreement or under s. 3 of the Act.

Sir R. Finlay, K.C., and *I. S. Fairty*, for the respondents. The obligation of the appellants under the agreement was to put the part of the roadway referred to into "proper repair," and when the increase of traffic made it proper to have a modern pavement the roadway could only be put into "proper repair" by laying down pavement of that kind. The agreement should be construed in relation to the obligation of the municipality in respect of the roadway. The authorities show that the duty of a road authority is to keep the roads in a reasonably fit state to bear the traffic which may be expected upon them: *Chichester Corporation* v. *Foster*. (1) Further, upon the true construction of s. 3 of the Ontario Railway and Municipal Board Amendment Act, 1910, the word "tracks" includes that part of the roadway used by the railway and eighteen inches on either side of the rails. The Board had jurisdiction to make the order under that section, independently of the obligation upon the appellants under the agreement. [*Canadian Pacific Ry. Co.* v. *Grand Trunk Ry. Co.* (2) was also referred to.]

Clauson, K.C., replied.

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Jan. 20.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario affirming, with a variation on a minor point, an order of the Ontario Railway and Municipal Board. The question in the case which

(1) [1906] 1 K. B. 167. (2) (1914) 49 Can. S. C. R. 525.

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presents real difficulty arises on the construction of an agreement made on September 4, 1899, and confirmed by the Toronto Suburban Street Railway Company Act, 1900. This agreement was made between the corporation of the township of York, within the limits of which was at that time the land on which part of the railway was situate, and the railway company. In 1909 this land was included within the municipal limits of the respondents, who succeeded to the rights and obligations of the other corporation. Under the agreement referred to the railway company was given the right to construct, maintain, and operate "an iron or steel rail or tramway, single and double tracks," subject to certain conditions, along certain roads and streets, including portions of Bathurst Street and Davenport Road, within the land referred to, the motive power to be either electrical or horse power, unless the corporation should consent to some other power. The township engineer and the town council were to prescribe the location of the tracks. These tracks when laid on any portion of the travelled road were, so far as practicable, to conform to the street or road, and were to be laid flush with the streets so as to cause the least possible impediment to traffic. Clause 6 was in these terms: "The company shall, where the rails are laid upon the travelled portion of the road, keep clean and in proper repair that portion of the travelled road between the rails and for eighteen inches on each side of the rail or rails lying on or being next to the travelled road, and in default the township may cause the same to be done at the expense and proper cost of the company."

By clause 20 all persons using the street were to be at liberty to travel upon any part of the roadway occupied by the railway and in the same manner as upon other portions of the highway. The agreement also enabled the corporation to take up any part of the street or road along which the railway was constructed for the purpose of altering the street or road grade, and for other purposes, which were to include all those which were within the province and privileges of a municipal corporation. There was also a clause enabling the corporation, in case the company should neglect to keep their track or roadway in good condition, according to the terms of the agreement, or to have the prescribed

repairs made, to give notice to the company, and in default of the latter executing the repairs, to effect them, and recover the cost from the company, and to determine their rights under the agreement. The rights and privileges of the railway company under the agreement were to endure for twenty years.

In April, 1912, the respondents applied to the Ontario Railway and Municipal Board, which had power and authority to deal with such matters vested in it under the Ontario Railway and Municipal Board Act, 1906, for an order directing the appellant company to "reconstruct and put in a proper and sufficient state of repair its tracks and sub-structures in Bathurst Street and Davenport Road in the city of Toronto, and eighteen inches on each side thereof."

The controversy which arose on this application was substantially as follows. The roads in which the rails had been originally laid were at that time mud roads, or at all events unpaved. The respondents at the date of the application desired that these roads should be reconstructed, and to that end dug out and paved with blocks. The appellants did not contest their liability to keep the portion of the roads between the rails and for eighteen inches on each side of them in repair, but they maintained that they were under no obligation to reconstruct this space so as to make it a roadway of an improved character, such as the respondents were designing for the rest of the roadway on each side.

In support of their case the respondents relied not only on the agreement itself, but on the Ontario Railway and Municipal Board Amendment Act, 1910. This Act, by s. 3, provided that "whenever in the opinion of the Board repairs or improvements to or changes in any tracks, switches, terminals or terminal facilities, motive power or any other property or device used by any railway company in or in connection with the transportation of passengers, freight, or property ought reasonably to be made thereto in order to promote the security or convenience of the public, or of the employees of the company, or to secure adequate services or facilities for the transportation of passengers, freight, or property, the Board, after a hearing had either upon its own motion or after complaint, shall make and serve an order directing

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such repairs, improvements, changes, or additions to be made within a reasonable time, and in a manner to be specified therein . . . ."

As the result of the application the Board made an order directing the appellants to put in a proper and sufficient state of repair its tracks and sub-structures in Bathurst Street and Davenport Road, and to dig out and pave that part of the roadway used for railway purposes and eighteen inches on either side thereof, the applicants being ordered to pave the remaining parts, the Board's engineer to supervise and direct the carrying out of the order, and in case of difference to determine the kind of pavement to be put down.

On appeal by the appellants to the Supreme Court it was declared that the Board had jurisdiction to make the order, and that the word "tracks" in s. 3 of the Ontario Railway and Municipal Board Amendment Act, 1910, included all that part of any roadway occupied by the railway. The portion of the order of the Board appointing the engineer to determine the kind of pavement to be used was, however, varied on the ground that it did not, as it should in the view of the Court have done, prescribe the kind of pavement which the appellants were to lay, and it was remitted to the Board to itself determine what the kind of pavement should be.

The decision of the Supreme Court was based not merely on the terms of the agreement, but also, as a separate ground of judgment, on the language of the section of the Act of 1910 already quoted. With the construction placed by the Court on this section their Lordships find themselves unable to agree. They cannot give to the word "tracks" used in the context in which it occurs in the section the wide interpretation placed on it by the Court, which extends it not only to the rails but to the ground occupied not only between the rails but up to eighteen inches on each side. They think that the words in the section "in or in connection with the transportation of passengers, freight or property," indicate an interpretation of a more restricted and literal kind, and exclude from the power given by the section the general roadway itself as distinguished from the rails, &c., laid upon it.

In the opinion of their Lordships the other question, which arises on the interpretation of clause 6 of the agreement of 1899, presents greater difficulty, and it is only after much consideration that they have arrived at a conclusion on this point. It is argued that the obligation of the railway company extends to the portion of the travelled road which the company occupy, in whatever improved condition that portion may have been put, the purpose of the section being to secure that the entire roadway shall be in the same condition throughout its entire breadth. This argument does not, however, suffice to determine the question at issue. It may well be that if the roadway has been improved by the respondents the standard of repair is what is contended for. But assuming this to be so, the conclusion does not warrant the further inference that the company have bound themselves to change the condition of the portion of the roadway assigned to them by paving it and so raise the standard of their obligation. It is one thing to undertake to keep what is handed over in proper repair on the footing of maintaining it in the state into which it has been put, and quite a different thing to interpret an agreement "to keep clean and in proper repair" as imposing an obligation to lay a new pavement of a kind which did not exist and was not provided for when the agreement was originally entered into, merely because the municipal authorities have themselves thought it right to improve the remainder of the roadway. Authorities were cited in the course of the argument in support of the different view of the operation of the words of the agreement which was taken by the Supreme Court of Ontario. But in construing a document such as that before them their Lordships do not think that decisions in other cases on the construction of provisions analogous to that before them are of much assistance in a question of this kind. Much turns in each case on the context. The document to be construed must be read as a whole, and in interpreting particular words these cannot be read without reference to what comes before and after. For example, the American case of *Mayor of New York* v. *Harlem Bridge Ry. Co.* (1) was much relied on in the judgment of the Court below in the present appeal. But there the law of the

(1) 186 N. Y. 304.

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State appears to have imposed a duty to keep "the surface of the street inside the rails, and for one foot outside thereof, in good and proper order and repair, and conform the tracks to the grades of the streets or avenues as they now are or may hereafter be changed by the authorities of the aforesaid towns." It was held that: "When the proper authorities, in view of the condition of the street as shown to exist, decided that a granite block pavement should be laid . . . . the requirement for repairing and keeping in good order compelled the defendant to co-operate with the city and put the space between its rails in the same condition as the rest of the street, even though that necessitated the laying of a new pavement."

It is no part of their Lordships' duty to say whether, if they had to construe a statute containing these words, they would have arrived at the same conclusion as the American Court of Appeals. It is sufficient to observe that the language in the present case differs materially from what the Court of Appeals had to construe. Here the obligation in clause 6 of the agreement is: "where the rails are laid upon the travelled portion of the road" to "keep clean and in proper repair that portion of the travelled road between the rails and for eighteen inches on each side." The tracks are, by clause 5, to conform to the street or road and to be laid flush with the streets. It may well be that if the respondents desire to pave the whole of the travelled road they may do so at their own expense, using the powers conferred on them by clause 17 to take up the street or road for any purposes within the province and privileges of a municipal corporation. But the restricted language of clause 6, which imposes an obligation on the appellants, appears to their Lordships on consideration prima facie to confine that obligation to keeping in proper repair what is already there, and not to extend it to the doing of works which would give the portion of the road between and beside the rails a new character.

For these reasons their Lordships are of opinion that the Railway and Municipal Board had no jurisdiction to make the order appealed from, and that the Supreme Court of Ontario was wrong in affirming that order. They will therefore humbly advise His Majesty that this appeal should be allowed and the

orders in question should be discharged. The respondents must pay the costs of this appeal and of the appeal to the Supreme Court of Ontario.

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Solicitors for appellants: *Linklater & Co.*
Solicitors for respondents: *Freshfields.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL OF SOUTHERN NIGERIA . . . . . } APPELLANT;

AND

JOHN HOLT AND COMPANY (LIVERPOOL), LIMITED AND OTHERS . . . . } RESPONDENTS.

J. C.* 1914 *Nov.* 5, 6, 12, 13, 16; 1915 *Feb.* 9.

[AND CROSS-APPEAL.]

ATTORNEY-GENERAL OF SOUTHERN NIGERIA . . . . . } APPELLANT;

AND

W. B. MAC IVER AND COMPANY AND OTHERS . . . . . } RESPONDENTS.

[AND CROSS-APPEAL.]

APPEALS AND CROSS-APPEALS CONSOLIDATED.

ON APPEAL FROM THE SUPREME COURT OF SOUTHERN NIGERIA.

Foreshore—Riparian Owners—Accretion—Artificial Reclamation—Knowledge of Crown—Duty of Crown to prevent Sea Incursion—Preservation of Riparian Rights—Rights in Reclaimed Land—Licence.

The respondents were in occupation of lands on the shore of the island of Lagos and there carried on businesses as African merchants. The lands had originally been granted by native grants to the respondents' predecessors in title, who in 1861 had obtained Crown grants. All the grants described the lands as bounded by the sea. About 1860 a wharf and two piers had been built upon the foreshore. At various dates subsequent to the Crown grants the respondents had carried out works on the foreshore to prevent incursion by the sea and erosion.

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* *Present:* LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

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Owing to these works a strip of land had been reclaimed below that which in 1861 had been high water mark. The respondents had built stores and sheds upon the reclaimed land and had for a period of from thirty to fifty years used it, together with the land granted and the piers and wharf, for the purposes of their businesses and had had exclusive possession. The Government of the island had knowledge of the reclamation and of the building upon and use of the reclaimed land:—

Held, that the reclaimed land, not being the result of natural accretion, vested in the Crown as owner of the foreshore, but that the respondents continued to have the rights of riparian owners over the foreshore, and that there was to be presumed in the respondents' favour an irrevocable licence from the Crown to erect buildings and to store goods upon the reclaimed land and to use it generally for the purposes of their businesses.

CONSOLIDATED APPEALS and cross-appeals from two judgments of the Full Court of the Supreme Court of Southern Nigeria (April 22, 1911) varying the judgment of Osborne C.J. (March 14, 1910).

The questions for determination in the appeals were as to the rights of John Holt and Company (Liverpool), Limited, and W. B. MacIver and Company, Limited (hereinafter referred to as the respondents), in certain lands situated on the shore of the island of Lagos and over the adjoining foreshore. The lands in question consisted of five plots granted by native chiefs or the King of Lagos to the respondents' predecessors in title, who after the cession of the island in 1861 had obtained Crown grants in respect of them. These grants described the lands as being bounded by the sea or lagoon, but contained no grant of the foreshore. The respondents had for many years occupied the lands for the purposes of their respective businesses as African merchants; of part they were freeholders and of part tenants. The following acts of user were proved or admitted. (*a*) The respondents' predecessors built a wharf and two piers about 1860; (*b*) about 1879 a retaining wall was built in front of one plot, and was extended in front of the adjoining plot between 1886 and 1888; (*c*) from time to time stakes were driven into the foreshore to protect the land from erosion; (*d*) the respondents and their predecessors used the foreshore and the land near the waterside for storage and other purposes of their businesses and had built stores, sheds, and other works thereon.

The land near the waterside so used included a strip of shore which had been below high water mark in 1861 but had become dry land owing either to natural accretion or to artificial reclamation, the respondents alleging the former cause, the Crown the latter. The respondents had, for a period of between thirty and fifty years, used this strip of land, together with the lands granted and the piers and wharf, for the purposes of their business, and had had exclusive possession. There was no public right of way over the foreshore. In 1907 the Government of Lagos began the construction of a public road along the waterside and continued it across the strip of land above referred to, thus cutting off part of the land occupied by the respondents, and the stores and sheds thereon, from the sea or lagoon and from their wharf and piers. The facts are more fully stated in the judgment of their Lordships.

The respondents instituted suits against the Attorney-General to recover compensation for the loss which they would sustain, but these suits had not been proceeded with pending the present proceedings.

On March 17, 1909, and April 2, 1909, the Attorney-General filed informations against the respondents respectively praying for declarations that the Crown was seised of and entitled to the foreshore of the lagoon or of so much as was appurtenant to the five plots and for other incidental relief. The cases proceeded, by consent, upon the basis that it was desired to obtain the decision of the Court as to the rights of the respective parties not only in the foreshore but in the strip of land above referred to.

By Ordinance 3 of 1863 of Lagos, English law is there applicable so far as local circumstances permit, and unless inconsistent with any ordinance in force in the Colony.

The trial took place before Osborne C.J., who delivered judgment on March 14, 1910. The learned Chief Justice held that under the treaty of cession of the island in 1861 the foreshore became vested in the Crown, subject to the then existing rights of riparian occupiers to use it for the purpose of access to the water, and for landing and embarking and hauling up canoes. With regard to the question of accretion or reclamation, he said that it was impossible to say how far the additions to the land

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were due to accretion and how far to reclamation, but that it must have been to some extent the result of the acts of the occupiers and consequently belonged to the Crown. The learned Chief Justice, however, was of opinion that the Government must have been aware of the reclamation and of the subsequent building upon and user of the reclaimed land, and that the presumption was that these acts were done with the permission of the Governor for the time being. This permission, he thought, was probably by licence to the riparian owners, in consideration of their reclaiming land from the lagoon at their own expense, to make use of the land so reclaimed for the purposes of their business. He held on the authority of *Plimmer* v. *Mayor of Wellington* (1) that the licence had become irrevocable and, being of indefinite duration, perpetual. The learned Chief Justice accordingly made a declaration that the Crown was entitled to the foreshore subject to the rights of the respondents as riparian owners and subject, as to the reclaimed land, to a perpetual right in them to place and store such things thereon and to erect such buildings thereon and generally to use it in such manner as they might deem expedient for the purpose of carrying on business as merchants.

Cross-appeals were made to the Full Court consisting of the said Osborne C.J. with Griffith C.J. (Gold Coast) and Winkfield J. Judgments were delivered on April 22, 1911, dismissing the appeals of the companies, and in the appeals of the Attorney-General varying the judgments by declaring the respondents entitled only to an easement by prescription, as to one plot, to use such of the reclaimed land as had not been built on for the purpose of storing thereon coopers' stores, casks, trade goods and produce, and to easements by prescription in respect of two jetties upon the foreshore. Osborne C.J. agreed with the other members of the Court that his judgment at the trial was erroneous on the ground that the Governor of the island could only make grants and dispositions of Crown lands under the seal of the Colony, and had no authority to make an indirect grant in any other manner. All three judges based their judgments upon findings of fact similar to those at the trial and

(1) (1884) 9 App. Cas. 699.

expressed the view that the addition to the land was mainly the result of artificial reclamation by the respondents and their predecessors, Osborne C.J. and Winkfield J. stating further that in their view there was no evidence that any part of it was due to natural accretion.

There were cross-appeals to His Majesty in Council.

P. O. Lawrence, K.C., *A. R. Pennington*, and *Whinney*, for the appellant, the Attorney-General. The Attorney-General appeals only from so much of the judgment of the Full Court as declares that the respondents are entitled to an easement to place coopers' stores, casks, and trade goods upon the reclaimed land. The respondents were in exclusive possession of the servient land and could not therefore acquire an easement over it by prescription: *Lyell* v. *Lord Hothfield*. (1) Further, the easement is too wide since it was not confined to the respondents' own goods and might extend to the occupation of the whole servient land. There is no English authority to support an easement of this character. In the United States the law recognizes wider easements than our Courts. [*Richardson* v. *Pond* (2) was referred to.] The grants did not extend to the foreshore; "a grant of land abutting on the sea does not carry the adjoining foreshore": per Cotton L.J. in *Attorney-General* v. *Portsmouth Corporation*, cited in Stuart Moore on Foreshores, 3rd ed., p. 557. The land in dispute was the result of artificial reclamation and not of imperceptible natural accretion; it consequently did not become part of the respondents' lands.

Cave, K.C., *Tomlin, K.C.*, and *A. T. Miller*, for the respondents (appellants upon the cross-appeals). The easement appealed against does not entitle the respondents to occupy the whole land or to leave goods upon it permanently. It is claimed as appurtenant to the respondents' businesses, and if it is unreasonably exercised the respondents can be restrained. Whatever can be the subject-matter of a grant can be enjoyed as an easement: Gale on Easements, 8th ed., pp. 22 to 24. But upon the true view of the facts and law the respondents are entitled upon their cross-appeals to wider rights. Even assuming that the foreshore

(1) [1914] 2 K. B. 911. (2) (1860) 15 Gray (Mass.) 387.

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was not vested in the respondents under their grants, they have as riparian owners greater rights than members of the public and are entitled as an easement to have access to the sea from their lands: *Lyon* v. *Fishmongers' Company* (1); *Attorney-General of Straits Settlements* v. *Wemyss* (2); *Marshall* v. *Ulleswater Steam Navigation Co.* (5) Further the evidence shows that the disputed land was the result of a gradual natural accretion, and it therefore became a part of the respondents' lands: *Rex* v. *Lord Yarborough.* (4) The later authorities establish that the same result follows even if the process has been assisted by artificial works carried out to protect the land from erosion: *Attorney-General* v. *Chambers* (5); *Doe* v. *East India Company.* (6) The foreshore, however, never was the property of the Crown, but formed part of the respondents' lands. The respondents' title rests upon the native grants, and the evidence shows that by native custom the grants carried the land down to low water mark, as would have been the case under Scottish law. The Crown grants merely confirmed the native grants. Where the terms or effect of a grant are ambiguous as to whether particular land is included, evidence of user of the land is admissible to establish the identity of the land granted: *Duke of Beaufort* v. *Swansea Corporation* (7); *In re Belfast Dock Act* (8); *Van Diemen's Land Co.* v. *Table Cape Marine Board* (9); *Attorney-General for Ireland* v. *Vandeleur.* (10) It was not denied that the respondents had exclusive possession of the land in dispute and had always used it for the purposes of their businesses as part of the land granted. If the disputed land was not part of the land granted, nor an addition to it by natural accretion, the respondents are nevertheless entitled to succeed upon the principle of *Plimmer* v. *Mayor of Wellington.* (11) It is the duty of the Crown to protect the land from incursion by the sea: *Attorney-General* v. *Tomline.* (12) Where, as in the

(1) (1876) 1 App. Cas. 662.
(2) (1888) 13 App. Cas. 192.
(3) (1871) L. R. 7 Q. B. 166.
(4) (1824) 3 B. & C. 91; (1828) 2 Bli. (N.S.) 147.
(5) (1859) 4 De G. & J. 55.
(6) (1856) 10 Moo. P. C. 140.
(7) (1849) 3 Ex. 413.
(8) (1867) I. R. 1 Eq. 128.
(9) [1906] A. C. 92.
(10) [1907] A. C. 369.
(11) 9 App. Cas. 699.
(12) (1879) 12 Ch. D. 214; (1880) 14 Ch. D. 58.

present cases, a subject has for a long series of years made defensive works upon the foreshore with the knowledge of the Crown, there is a strong presumption that it has been done with the sanction and under the licence of the Crown. It should be presumed that in consideration of the respondents erecting defensive works the Crown licensed them to use the land reclaimed for their businesses. This licence is irrevocable.

P. O. Lawrence, K.C., in reply and for the Attorney-General upon cross-appeals. There were concurrent findings that the disputed land was, in the main, the result of artificial reclamation. There was no evidence of natural accretion, only of erosion. Further, the limits of the grant were well defined and the rule as to natural accretion consequently does not apply: *Foster* v. *Wright* (1); *Hindson* v. *Ashby* (2); *Attorney-General* v. *Chambers*. (3) The case of *Plimmer* v. *Mayor of Wellington* (4) is distinguishable, as in that case the Government requested its tenant to carry out the works. Acts of acquiescence by officers of the Government do not bind the Executive: *Ontario Mining Co.* v. *Seybold*. (5) There was no such acquiescence as entitles the respondents to the rights claimed: *Wilmot* v. *Barber* (6); *Russell* v. *Watts*. (7)

Cave, K.C., in reply upon the cross-appeals. Where there has been continuous and uninterrupted enjoyment of a right during a period of many years, a deed embodying the right will be presumed: *Phillips* v. *Halliday*. (8)

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Feb. 9.

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. These are two appeals and two cross-appeals, all consolidated, against two judgments pronounced by the Full Court of the Supreme Court of Southern Nigeria on April 22, 1911, varying the judgment of Osborne C.J. pronounced on March 14, 1910. For the sake of convenience the Attorney-General for Southern Nigeria is hereinafter referred to as "the Crown" and the opposite parties as "the respondents."

(1) (1878) 4 C. P. D. 438.
(2) [1896] 2 Ch. 1.
(3) 4 De G. & J. 55, at p. 71.
(4) 9 App. Cas. 699.
(5) [1903] A. C. 73.
(6) (1880) 15 Ch. D. 96.
(7) (1883) 25 Ch. D. 559; (1885) 10 App. Cas. 590.
(8) [1891] A. C. 228.

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The proceedings relate to certain lands in the district of Olowogbowo, in the island of Lagos, which became a part of the Colony of Southern Nigeria. The lands consist of five plots, all of which are situated on the shore of the lagoon. As commerce has developed, these lands, and especially the frontage thereof to the sea, have become of considerable value. They adjoin each other; and in the view which is to be taken of these appeals the facts as to the different plots may be sufficiently stated as follows: The respondents Holt and Company were in occupation claiming as freeholders of (1.) William's land and (2.) Dunkley's land, and as tenants of the executors of the Reverend James White, who claimed to be the freeholders of (3.) White's land. The respondents MacIver and Company were in the occupation of (4.) George's land and (5.) Johannsen's land as tenants of the freeholders of these respective plots. The whole premises were occupied for the purpose of the respondents' respective businesses as African merchants.

In regard to the possession and occupancy of the properties, the admitted facts are these: A wharf was built from George's land in or before the year 1859, a pier was built from Johannsen's land prior to the year 1861, and a pier was also built from Dunkley's land soon after that year. The respondents, it is further admitted, built stores, sheds, and other works at different dates upon the land adjoining the waterside, and in particular upon not inconsiderable portions of the solum of the land in question in the case, namely, that which had been foreshore, i.e., land between high and low water marks at ordinary spring tides. The respondents and their predecessors used the foreshore and land for storage and for the purposes of their business; and the wharf and piers already mentioned were also used by them in connection with their trade.

While upon the one hand there seems little doubt that for about half a century continuous use and possession were had—of the kind and nature just described—and that, as trade developed, additional buildings and erections were put upon the ground, yet upon the other hand it is admitted that this use and possession cannot be established for a period of sixty years.

To complete the general statement of the facts, it may be

mentioned that a retaining wall was built to protect Dunkley's land prior to 1879, and that this retaining wall was continued in front of William's land in the years 1886-88. Further, as was stated on the appeal to the Full Court, there was no public right of way over the foreshore.

In the year 1907 or 1908 the Government of the island began the construction of a public road along the waterside of the lagoon. The road was continued over the lands in dispute in the present case. By this means the five plots belonging to the respondents have been cut off from the waters of the lagoon, and from their wharves and piers. By the construction of the road so made some of the stores, buildings, and sheds erected by the respondents or their predecessors have been destroyed, and the use and possession of the respondents' lands have been in an important degree subverted. It became, accordingly, necessary to determine the nature of the rights of parties so as to settle the basis upon which compensation shall be made.

The form of the proceedings is by way of information. It is only necessary to look at the prayer of these to observe the startling consequences which would result to all the respondents' properties should that prayer be granted as it stands. For it is prayed that a declaration be made of the absolute right of the Crown in the land in dispute, and for an injunction and peaceable possession. The result of this would be the complete extrusion of the respondents from land, foreshore, wharves, and piers. The properties themselves, instead of being properties abutting on the sea, would be separated therefrom by the road to be constructed, and be converted into hinterland.

Their Lordships are not surprised that the advisers of the Crown shrank from the consequences of this sweeping demand. The only substantial concession made, however, was that, as to Dunkley's land and Johannsen's land, no appeal was presented against that portion of the judgment of the Court below which declared that the respondents have acquired an easement for a jetty and a right of way thereto from these respective lands. Subject to this, the demand of the Crown is maintained in all its breadth.

This is the first time that process by way of information

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has been used in Southern Nigeria, and it is remarked by Osborne C.J. that "It has proved exceedingly difficult to adapt to the Supreme Court Ordinance and the procedure rules thereunder, which are framed to meet the requirements of a community wherein illiterate suitors not uncommonly conduct their own litigation." Strict English procedure was accordingly departed from, and the Courts went further in considering themselves not limited by the actual wording of the informations and pleadings. This occurred with the consent of both parties. "What," said the learned Chief Justice, "we are really asked to do is to ascertain and declare what have been the rights of the respective parties from the time of first occupation of their lands by their predecessors in title, not only with regard to foreshore, but with regard also to a strip of land which lies between the limits specified in the various grants relating to the defendants' lands, and the low water mark of the lagoon."

While it is true that this state of the record may import certain difficulties into the case, their Lordships pass no adverse comment upon the course taken by the parties and the Courts below. And they desire to express their sense of the thoroughness and care with which the perplexing problems which emerge in the case, both upon the law and in fact, have been treated by all of the learned judges.

It appears from the historical narrative in the judgment of Osborne C.J. that about 1850 Lagos, then under powerful chiefs, was one of the principal centres of the slave trade. It was bombarded in 1851 by a British force, and on January 1, 1852, the slave trade was finally abolished. A British Consulate was established, and there was an influx of many liberated slaves from Sierra Leone and elsewhere. There seems no reason to doubt the opinion of the learned Chief Justice that the land had originally belonged to tribal communities, but that "during the decade between 1852 and 1862 the practice of alienation sprung into vogue, and another new feature, totally foreign to native law, which knew not writing, was introduced in the shape of written grants by the King of Lagos. The land in Lagos was originally attached to the stools of the white cap chiefs, who were in no way subordinate to the early Kings." In course of time,

however, the royal power increased and the tribal and chieftain power diminished. This was the state of matters when King Docemo and his chiefs, on March 6, 1861, entered into a treaty of cession of the port and island of Lagos to Her Majesty the Queen of Great Britain.

The treaty is printed at length: the only question which has been mooted upon it is as to whether by its terms it granted sovereignty and jurisdiction alone to the exclusion of property. The words are complete and absolute, they "grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the port and island of Lagos, with all the rights, profits, territories, and appurtenances whatsoever thereunto belonging, and as well the profits and revenue as the direct, full, and absolute dominion and sovereignty of the said port, island, and premises, with all the royalties thereof, freely, fully, entirely, and absolutely." Their Lordships do not refer to the treaty further than to say that in their opinion property was not excluded from the grant; and they think also that this is subject to the condition that all rights of property existing in the inhabitants under grant or otherwise from King Docemo and his predecessors were to be respected. It may be that these required confirmation by subsequent procedure, prescribed by way of ordinance or otherwise, but no question on that head arises in the present case.

On March 13, 1862, the ceded territories, under the title of Settlement of Lagos, were erected into a separate government. On February 19, 1866, Lagos became part of the West African Settlements. On July 24, 1874, the Gold Cost Colony, including Lagos, was formed. On January 13, 1886, Lagos again became a separate colony, and finally, on May 1, 1906, it became part of the Colony of Southern Nigeria. This is briefly the political history of the island; but none of these changes, recorded in the judgments of the Court below, effected any alteration in the status of occupants of land, or in the nature of the tenure thereof.

With regard to the plots of land in question in the present case, the one point which has a really important bearing upon the questions to be determined in the appeals is as to the

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boundary seaward of those plots. On January 21, 1864, a Crown grant was executed in favour of William, who had been in possession for twelve years before, and the boundary on the south-west side of the property was stated to be the river Lagos. In 1861 there had been a grant of the next plot by King Docemo to a native called Captain Harry Johnson; Johnson sold to Dunkley, and in 1869 Dunkley obtained a Crown grant. There is a peculiarity as to the southern boundary, which is stated to be the "Marina," but it appears to be a fact that there was no "Marina" or public thoroughfare in that island, and, as the Chief Justice states, there is evidence that Dunkley himself had previously reclaimed some land and built a sea wall thereon as early as 1868, and that at the time he acquired the Crown grant he had a jetty or pier opposite his land. As to the third plot, the original grant was to the Reverend James White, in 1861, and in his Crown grant the western boundary is stated to be the lagoon. The fourth plot, namely, George's land, was the subject of a grant from King Docemo, and the boundary is described as "facing the lagoon." The fifth plot, namely, Johannsen's land, is described as having a water frontage, and in an earlier agreement the property is said to include the ground on the beach.

Their Lordships do not investigate these titles in further detail. For in their opinion they are substantially at one in this, that the properties were each and all treated in description as being bounded in fact by the sea. The expression may be in one case the river Lagos, in another the lagoon, and so on, but a sea frontage was that which was meant, and in their Lordships' opinion was sufficiently expressed. They were riparian properties.

In the next place, in their Lordships' view, there was no express grant of foreshore made in any one of these titles, nor can any grant of foreshore be implied, looking to the language of description which is employed. Their Lordships are not moved by the fact that in some cases measurements are given; these would have to yield to the description. But the description itself is a water lagoon or sea boundary, and, as stated, this, in the opinion of the Board, does not embrace foreshore within the scope of the grant.

Before adverting to the state of possession of these properties, their Lordships think it right to allude to one fact with regard to the sea frontage. A swift current sweeps along the shore. The effect in the past has been to erode the coast, and it has been the practice in time past memory to erect upon the shore stakes or "cabbage posts" to prevent the serious inroad and ravages of this tidal erosion. The practice was not only known to the British Government, but so early as 1864 it was recognized, and indeed enforced, by an ordinance confirmed upon March 28 of that year. A road had been made along a part of the riverside, and the owners of land abutting on the road were ordained, among other things, to drive in stakes in the bank of the river in such a manner as should be required by the Government surveyor—the narrative of the ordinance being that the road was liable to be put out of repair and the soil carried away by inter alia "the action of the tide at the base thereof." The reason of the ordinance is stated to be the convenience and comfort of Her Majesty's subjects. There can, in the opinion of the Board, be little doubt that the erosive action of the sea was such along the coast of Lagos that a protection against it was considered not only to be for private but for public advantage.

Before stating the nature of the operations conducted by the respondents, their Lordships, in view of the argument presented to them, think it necessary to consider the rights in the properties, the descriptions whereof have been already alluded to, in reference to the doctrine of the accretion from the sea. In the first place, their Lordships are of opinion that when de facto the boundary was the sea under the different names already alluded to, there is nothing in the law or the nature of the case to prevent the application of the ordinary doctrine of accretion or dereliction to such a condition of things. On the one hand, if erosion had continued, their Lordships do not doubt that it would have been no defence against the claim of the Crown that the foreshore upon the line of inroad had de facto been transferred to the Crown as owners of the sea and its bed within territorial limits, and of foreshore, even although the line of the eroded foreshore had made considerable invasion into the measured plots of lands, as these were described in the titles.

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Upon the other hand, if accretions had been formed in the course of nature by the silting up of sand, gravel, and the like, and these accretions had been of the gradual character to be afterwards referred to, they would have been added to the land, notwithstanding the measurement in square yards or feet which the title contained.

The reason of this is not far to seek, and it is substantially to be found in that general convenience and security which lie at the root of the entire doctrine of accretion. To suppose that lands which, although of specific measurement in the title deeds, were de facto fronted and bounded by the sea were to be in the situation that their frontage to the sea was to disappear by the action of nature to the effect of setting up a strip of land (it might be yards, feet, or inches) between the receded foreshore and the actual measured boundary of the adjoining lands, which strip was to be the property of the Crown, and was to have the effect of converting land so held into inland property, would be followed by grotesque and well-nigh impossible results, and violate the doctrine which is founded upon the general security of landholders and upon the general advantage.

The whole of this question as applicable to lands de facto fronting a river but described by measurements which excluded its bed was anxiously discussed in the case of *City of London Land Tax Commissioners* v. *Central London Railway*. (1) The law with reference to river and street boundaries of property was there gathered together, and it need no longer be matter of doubt that the operation of the rule of adding to the ownership of riparian lands the property of the soil ad medium filum is not interfered with on account of a specific or scheduled measurement of the land, a delineation or colouring on a plan, which measurement, delineation, or colouring does not in fact include any part of the bed of the river or of the street. Similarly, in their Lordships' opinion, properties scheduled or specifically measured but in fact abutting on the seashore are not excluded from the operation of the rule which adds to riparian lands the increment which is caused by natural and gradual accretion from the sea. In the present case, accordingly, the conveyances of the properties

(1) [1913] A. C. 364.

which are in question in this appeal were in the opinion of the Board habile to cover the land formed by slow, gradual, and natural accretion.

Although various points were brought before their Lordships in the direction of questioning the law of accretion, their Lordships, for the reasons stated, do not doubt its general applicability to lands like those of the respondents' abutting on the foreshore. Nor do they, however, doubt the one condition of the operation of the rule. That is that the accretion should be natural, and should be slow and gradual—so slow and gradual as to be in a practical sense imperceptible in its course and progress as it occurs.

There has been much written and decided law upon this subject, and, notwithstanding the very full argument, it need not be entered upon at large. But in spite of the wealth of authority, including the dicta in Hale's De Jure Maris and of many eminent judges, it is not clear that the general proposition has been advanced beyond that laid down by Justinian in his Institutes, bk. ii., tit. i., s. 20: "Praeterea quod per alluvionem agro tuo flumen adjecit jure gentium tibi adquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adjici, quod ita paulatim adjicitur, ut intellegere non possis quantum quoquo momento temporis adjiciatur." Blackstone says (vol. ii., chap. xvi.), "As to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little by little, by small and imperceptible degrees, it shall go to the owner of the land adjoining." Blackstone then introduces by way of explanation a reference to a doubtful brocard de minimis non curat lex, which Lord Chelmsford in *Attorney-General* v. *Chambers* (1) properly disclaims. The true reason for the principle of law in regard to foreshores is the same reason as the principle in regard to river banks, i.e., that it is founded upon security and general convenience.

In *In re Hull and Selby Railway* (2) Lord Abinger C.B.,

(1) 4 De G. & J. 55, at p. 66. (2) (1839) 5 M. & W. 327.

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referring to *Lord Yarborough's Case* (1), said: "The principle there established is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property."

The case of *In re Hull and Selby Railway* (2) is important not only for the opinions of Lord Abinger and Alderson B., but for the fact of its acceptance of this principle of the law (settled as between subject and subject) to the relations between the subject and the Crown. "In all cases," said Lord Abinger, "of gradual accretion, which cannot be ascertained from day to day, the land so gained goes to the person to whom the land belongs, to which the accretion is added; and vice versa," and he repeats in different words his main proposition—"No authority is needed for this position, but only the known principle which has obtained for the mutual adjustment and security of property."

Alderson B. dwelt specially upon the double-sided operation of the rule. "I think," he said, "the question is precisely the same, whether the claim is made against the Crown or the Crown's grantee. Suppose the Crown, being the owner of the foreshore—that is, the space between high and low water mark—grants the adjoining soil to an individual, and the water gradually recedes from the foreshore, no intermediate period of the change being perceptible, in that case the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the Crown would be the gainer of the land. The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question."

In the case of *Attorney-General* v. *Chambers* (3) Lord Chelmsford refers to the double-sided operation of the rule in this way: "It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the sea-shore."

(1) 2 Bli. (N.S.) 147. (2) 5 M. & W. 327.
(3) 4 De G. & J. 55.

As to the nature of the accretion, it must be, as already mentioned, so gradual as in a practical sense to be imperceptible in its progress. "Considering," said Abbott C.J., "the word 'imperceptible' in this issue, as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time." This statement of the principle, namely, that the accretion is to be something which is imperceptible in the sense of not being observed in its actual progress, goes no further than the words of Justinian already quoted.

It was strongly contended before the Board that the facts of this case showed it to be substantially one of natural accretion. The argument was this. In accordance with the policy generally approved, stakes were set out between high and low water mark, and the silting up took place within those stakes and between them and the actual shore, and, secondly, any artificial erections were merely for the purpose of levelling the ground so as to make it suitable for the landing of cargoes, and avoiding the erosive action of the sea. The view thus presented certainly does receive no inconsiderable justification from language employed in the judgments of the Court below. More than one reference is made to "the question of the reclaimed or silted-up land," and no distinction appears to be clearly drawn between the one and the other. Artificial reclamation and natural silting up are, however, extremely different in their legal results; the latter, if gradual and imperceptible in the sense already described, becomes an addition to the property of the adjoining land; the former has not this result, and the property of the original foreshore thus suddenly altered by reclamatory work upon it remains as before, i.e., in cases like the present, with the Crown.

The history of the foreshore adjoining these lands, and of the operations thereon, produces one of the main difficulties of the present case. Their Lordships have come to the conclusion that they are confronted with substantially concurrent judgments of the Courts below upon this question of fact. Upon the appeals Griffith C.J., after referring to the finding of the trial judge, said: "I have no reasonable doubt that the great bulk of the land

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between the Crown grant land and the lagoon is the result of artificial reclamation on the part of the defendants and their predecessors."

Osborne C.J., who had been the trial judge, puts his judgment upon this point thus: "The evidence seems clearly to show that actual reclamation contributed more than alluvion to the extension of the lands in the occupation of the defendants and their predecessors in title, and as to actual gain by alluvion, uninfluenced by the defendants' and their predecessors' reclaiming operations, there is no direct evidence."

The finding is thus not very specific, although Winkfield J. goes the length of saying "It is not established that any part of the land neutral tint on the plan" (i.e., the land in question) "was the result of natural accretion or alluvion."

In this state of the judgment their Lordships are not in a position to hold themselves free to decline to accept the finding. Nor do they say that they would have come to a different conclusion. The case accordingly must be dealt with as substantially one of an addition to adjoining lands being caused artificially by the execution of reclamatory work.

The natural situation of the land was that, consequent upon the erosion mentioned, a relatively steep and inconvenient shore had been created. The reclamation mentioned undertaken by the respondents and their predecessors was not of the simple character of the erection of stakes, as alluded to, but was the building of a solid wall; and the evidence appears to point to the foundations of that wall having been sunk to the extent of at least a few feet in the soil between ordinary high and low water mark, i.e., in the foreshore itself. Nothing more natural could have been expected, and probably nothing more in the interest of all parties, including the Crown. The fact, however, being accepted as stated, the legal consequence follows, namely, that the doctrine of natural accretion cannot be held to apply.

The wall, having been founded as stated, was built up; the land within it and the old high line of foreshore was levelled; and the respondents and their predecessors have possessed the same ever since, that is, during a very long course of time, and they built thereupon from time to time

the warehouses and sheds which appear upon the plans. The ground upon which these are erected protrudes largely over the disputed territory. Upon the new wall frontage itself wharfage accommodation was constructed; and the whole, namely, piers, wharf, disputed land and property within the old boundaries, have been possessed together and used, roughly speaking, in this way for a period of between thirty and fifty years.

The judgment of the Full Court has affirmed various easements over reclaimed land (1.) in the case of William's land for the purpose of storing thereon coopers' stores, casks, trade goods and produce, and (2.) and (3.) in the case of Johannsen's and Dunkley's lands easements for jetties. Against these last the Crown has not insisted at their Lordships' Board; but with regard to the first point it is maintained that such an easement is unknown to the law. It is also further maintained that in any view the use to which the land was put by the respondents and their predecessors in title could not be the foundation of any easement, as it was not a right assumed to be taken or asserted over the land of another; the possession founded upon was possession of the land as owner thereof.

Their Lordships see no reason why upon the first point a right of easement should be exclusive of the storage claim. The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such. This principle is of general application, and was so treated in the House of Lords in *Dyce* v. *Hay* (1) by Lord St. Leonards L.C., who observed: "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind."

But in their Lordships' opinion the second contention of the Crown is correct. It seems to be undoubtedly true that what was done by the respondents was done by them as in their opinion upon their own lands. There was much in the nature of affairs and the legal situation to induce this opinion, and it is not to be wondered at that not only they, but all parties on the island, appear to have considered these operations, which were clearly

(1) (1852) 1 Macq. 305.

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beneficial to the general interest, in no way to be of the nature of wilful appropriation or of trespass, but merely of making good and proper use of their rights as owners of property abutting upon the sea. An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other. In the present case this was not so. For these reasons their Lordships are of opinion that the grounds upon which the judgment appealed from are put cannot be maintained.

There remains for consideration the judgment of Osborne C.J., which was inter alia defended in argument by the respondents, and to which it was part of their case that this Board should revert.

The respondents are not in a position to plead the benefit of prescription, as, although their buildings and erections have been used and occupied for a time unquestionably long, it has, as already mentioned, not reached the requisite period of sixty years.

Their Lordships have been referred, on the other hand, to cases like *Attorney-General for Ireland* v. *Vandeleur*. (1) But the facts of the present case cannot be subsumed under the category of lost grant. Although their Lordships are accordingly impressed with the long-continued possession, they are unable to discover in the law of England any acknowledged ground for holding that the property of the solum of the artificially reclaimed land has thereby become vested in the respondents.

A reference also was made to the case of *Phillips* v. *Halliday*. (2) But the circumstances of that case were remote from the present. What was decided was that a pew may be annexed to a dwelling-house within a parish "either by a faculty or by prescription, which supposes a faculty," and that a faculty might be presumed upon evidence of exclusive possession and repair for a long period. A passage in the judgment from the opinion of Herschell L.C. is much relied upon; it is to the following

(1) [1907] A. C. 369. (2) [1891] A. C. 228.

effect:—"In the case of *Rogers* v. *Brooks* (1), Willes J., a very learned judge, said, referring to a possession of only thirty-six years, that after so long a possession he would presume anything in favour of the plaintiff. No doubt that is a strong expression, and possibly there may be presumptions that ought not to be made even under such circumstances as those, but I think it points out how emphatically the view has been entertained by learned judges that where there has been long-continued possession which is consistent with a legal title, every reasonable presumption ought to be made in order to support the possession and maintain it as having been of right."

In the opinion of the Board this passage does not support the proposition that a transfer of the dominium of lands can be effected without the presumption of a lost grant, or without possession during the full requisite period of prescription. But the case does bear upon a question of maintenance of possession considered apart from declaration of ownership. The effect of this upon the present case will be immediately seen.

As to the facts, the dates of reclamation have already been given and the nature of the erections, operations, and occupation stated. To all intents and purposes the reclaimed ground was used along with and as part and portion of the respondents' properties as a whole; and the piers, wharves, and whole land have been, for the protracted period alluded to, used for the purposes of the shipping and mercantile businesses. Their Lordships are further of opinion that the circumstances in which the reclamation itself was made negative all ideas of intentional trespass or of surreptitious acquisition of land. As stated, the respondents' and their predecessors' acts of reclamation were good for all concerned, and were a public benefit. Their Lordships find themselves in agreement with Osborne C.J., who tried the cause, and has submitted both facts and law to a thorough consideration, that "it is quite impossible to believe that all the reclamation and subsequent building can have gone on without the knowledge and against the wish of the Government . . . . as the Government must have been aware of the reclamation and subsequent building, it is more probable that those acts were

(1) (1784) 1 T. R. 431, n.

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done with permission from the Governor for the time being than that they were acts of trespass done in defiance of the Government."

It remains accordingly for the Board to consider, under such circumstances, whether it is now the right of the Crown to subvert this long-continued occupation and to obtain an injunction which would extrude the respondents from the reclaimed land.

One result of no inconsiderable consequence would, of course, follow. The plots of land, all of which were bounded by the foreshore and the sea, would be converted into inland properties, and the result of artificial reclamation upon the foreshore forty years ago, a reclamation made as above described, not objected to, and followed by occupation ever since, would be the loss of all kinds of navigation, groundage, and other foreshore rights, and the destruction of probably the most serious elements of value in the whole of the respondents' properties.

Their Lordships are of opinion that this result is not in accordance with law. It may be that in building the foundation of the wall a stricter care should have been taken to keep on the landward side of the foreshore; but the foreshore, it should not be forgotten, was exceptionally troublesome; the erosion was going on and the current was so dangerous that in native opinion there was a devil in the water. In truth and substance what was done was to protect the land, to guard against invasion of the sea as a destructive force, and to conserve it for the use of the properties as an invaluable mercantile adjunct thereto. Further, so far as the Crown is concerned, it is recognized by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a licence had been granted and duly recorded to the respondents to reclaim as was done, that licence would have been in entire accord not only with the right of the subject but with this duty of the Crown. This principle is in accord with the law laid down in *Attorney-General* v. *Tomline* (1), and principally with the opinions of Fry J. (2) at the trial and Cotton L.J. in the Court of Appeal. (3)

(1) 14 Ch. D. 58. (2) 12 Ch. D. 214, at p. 233.
(3) 14 Ch. D. 58, at p. 69.

With regard to the use and enjoyment of the made up land by the respondents as merchants their Lordships are, as already indicated, of opinion that the same cannot, in the circumstances, be subverted. As to what may be called foreshore rights, as such, the point of the case seems to be what is the effect of a frontage owner reclaiming part of a foreshore which is vested in another. It appears from the case of *Lyon* v. *Fishmongers' Company* (1) that the frontage owner has foreshore rights annexed to his land beyond such rights as he possesses as one of the public. And the real question, therefore, is whether the reclamation made in the circumstances before described operates as an abandonment of these rights over the land reclaimed. The abandonment of rights annexed to land is a question of intention, and it is absurd to suppose that the frontagers in the present case intended to convert their holdings into what has been described as "hinterland." Further, it appears from the case of *Marshall* v. *Ulleswater Steam Navigation Co.* (2) that the reclamation of foreshore by the Crown or a third party would have no effect on the riparian rights of the frontagers, so that the frontagers' rights may exist even after the land has ceased to be subject to the flow and reflow of the tide.

The case has been brought in order to determine the principles upon which compensation shall be awarded to the respondents in consequence of the construction by the Crown of a road over the disputed land. Their Lordships desire to make it clear that it follows from their decision that the foreshore rights originally attaching to the respondents' lands before reclamation have accordingly not been destroyed thereby. The lands further will fall, upon the case of compensation, to be treated upon the principle laid down in *Duke of Buccleuch* v. *Metropolitan Board of Works* (3), as possessing not only rights of navigation and otherwise in and enjoyable by the public at large, but those special rights which are attached and add value to specific riparian lands.

Their Lordships will humbly advise His Majesty that the judgment of the Full Court should be set aside and the judgment

(1) 1 App. Cas. 662. (2) L. R. 7 Q. B. 166.
(3) (1872) L. R. 5 H. L. 418.

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of the Chief Justice in the Court of first instance on March 14, 1910, restored, except upon the point of costs. The Crown will pay to the respondents the costs of the appeals and of the causes in the Courts below.

Solicitors for appellant (the Attorney-General): *Sutton, Ommanney & Rendall.*

Solicitors for respondent companies: *Field, Emery, Roscoe & Medley, Agents for Alsop, Stevens, Crooks & Co., Liverpool.*

[PRIVY COUNCIL.]

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Feb. 8; *March* 9.

UNION STEAMSHIP COMPANY OF NEW ZEALAND, LIMITED . . . . . } APPELLANTS;

AND

WELLINGTON HARBOUR BOARD . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Shipping — Harbour Dues — Exemption — "Steamship carrying mails" — Agreement — Construction — Harbours Act, 1908 (*No.* 75 *of* 1908, *New Zealand*), *s.* 116, *sub-s.* 1 (*d*).

By the Harbours Act, 1908 (No. 75 of 1908, New Zealand), s. 116, sub-s. 1, "Nothing in this Act shall charge with any dues . . . . (*d*) any steamship carrying mails under any contract made with the Postmaster-General, in cases where it is provided by the terms of such contract that such steamships shall be exempt therefrom." Under a contract with the Postmaster-General of New Zealand the appellants were bound to provide a periodic service of steamships to carry mails from Wellington to San Francisco and vice versa. Clause 17 of the contract exempted steamships "employed in the service under this contract" from harbour dues at Wellington. Under liberty given them by clause 32 of the contract, the appellants extended the service by continuing the voyages from Wellington to Sydney and back, but without further payment by the Postmaster-General. The respondents claimed harbour dues (levied by them under the above Act) upon the appellants' steamships using the port of Wellington while engaged upon the extended service:—

Held, that the steamships while so engaged were not "employed in the service of the contract" so as to be exempt from dues, and that

* *Present:* LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, SIR GEORGE FARWELL, and SIR ARTHUR CHANNELL.

upon putting into Wellington from Sydney with the intention of proceeding to San Francisco they did not become "steamships carrying mails under the contract" (and consequently exempt) until they had discharged their freight and were ready and willing to receive the outgoing mails, subject only to coaling, necessary repairs, and the like.

APPEAL from a judgment of the Court of Appeal of New Zealand (October 28, 1913) affirming a declaratory order of the Supreme Court of New Zealand (April 3, 1913).

The respondent Board was the port and harbour authority for the port of Wellington, New Zealand, and a Harbour Board within the meaning of the Harbours Act, 1908 (No. 75 of 1908). In pursuance of powers conferred by ss. 46 and 208 of that Act, the respondents in 1912 made by-laws providing for the payment of various harbour dues in the said port.

The Harbours Act, 1908, s. 116, provides: "Nothing in this Act shall charge with any dues . . . . (*d*) any steamship carrying mails under any contract made with the Postmaster-General, in cases where it is provided by the terms of such contract that such steamships shall be exempt therefrom."

On November 11, 1910, the Postmaster-General for New Zealand entered into a contract with the appellants for the carrying of mails for one year at periodic intervals from Wellington to San Francisco by way of Auckland, Rarotonga, and Papeete, and from San Francisco to Wellington by way of Papeete and Rarotonga.

Clause 17 of the contract provided that during the continuance of the contract no charge for harbour dues should be made or levied under the Harbours Act, 1908, at Wellington or Auckland "for any of the steamships employed in the services under the contract, and all such vessels shall be exempt therefrom accordingly."

Clause 32 provided: "The company shall be at liberty to extend the service hereby provided for by continuing the voyage of the vessels employed hereunder and the conveyance of mails from San Francisco to Wellington to the port of Sydney and thence back to Wellington or Auckland at the option of the Postmaster-General, provided that no payment for such

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extended service shall be made to the company by the Postmaster-General, and provided also that the company shall in nowise allow such extension of the service and voyage as aforesaid to interfere with the due and regular service to and from Wellington or Auckland to San Francisco at the times and in manner hereinbefore provided for And to ensure the due and proper observance of the provisions of this contract it shall be obligatory upon the company in case it elects to extend the service under this clause to provide, maintain, and keep for such purpose a third vessel conforming in all respects to the requirements of the Postmaster-General and such extended service shall be maintained by the company under and subject to all the provisions hereinbefore contained."

Under provisions contained in the contract the Postmaster-General extended its duration for two years from October 19, 1911.

During the currency of the contract the appellants decided to exercise the liberty reserved to them by clause 32 to extend the service. The result of this extension was as follows: (*a*) The inward-bound steamer from San Francisco to Wellington, after discharging at Wellington her Wellington passengers and cargo and the inward mail carried under the contract, proceeded thence to Sydney carrying (1.) through passengers and cargo from San Francisco to Sydney; (2.) local passengers from Wellington to Sydney; (3.) in some cases mails from San Francisco and intermediate ports to Sydney; and (4.) in some cases local New Zealand mails for Sydney. (*b*) On the return voyage from Sydney to Wellington the same steamer carried (1.) through passengers and cargo from Sydney to San Francisco; (2.) local passengers from Sydney to Wellington; (3.) Australian mails to San Francisco and intermediate ports; and (4.) in most cases local Australian mails to Wellington. After discharging her local passengers and local mails at Wellington the steamer was ready to take her place in the service to San Francisco, as provided by the contract. When mails were carried between New Zealand and Sydney they were paid for outside the contract.

On January 4, 1913, the respondents issued against the

appellants an originating summons in the Supreme Court for the determination of the following question :—

Is the defendant company (appellants) exempt under the above circumstances from all dues to the plaintiff Board (respondents) in respect of the use by the defendant company's vessels, engaged in the said service and extension, of the port of Wellington and the wharves thereof and the services of the harbour master, or is the defendant company exempt from only a part or some of such dues, and, if so, what?

The various dues referred to were included in the definition of "harbour dues" contained in the Harbours Act, 1908, s. 5, and were levied by the respondents under powers given to them by ss. 46 and 208 of that Act.

The summons was heard by Stout C.J., who declared that the appellants were liable for the following dues :—(*a*) The harbour improvement rate on goods carried from Sydney and landed in Wellington; (*b*) berthage rate until the outgoing mails are received on board the vessel ; (*c*) harbour master's fees ; (*d*) port charges.

The Court of Appeal (Williams, Denniston, Edwards, and Sims JJ.) affirmed this order.

Sir Robert Finlay, K.C., and *Dighton Pollock*, for the appellants The extended voyage to and from Sydney was a service under the contract ; steamships engaged upon it were carrying mails under the contract and were entitled to exemption from dues under s. 116, sub-s. 1 (*d*). But if the voyage from Wellington to Sydney was not a service under the contract, the return voyage to Wellington for the purpose of there receiving the mails for conveyance to San Francisco was, and the vessels were exempt upon putting into Wellington for that purpose. The view of the learned Chief Justice and of the Court of Appeal that a vessel is not "carrying mails" within s. 116, sub-s. 1 (*d*), until the mails are actually on board is untenable; the expression means engaged under a contract for the carriage of mails.

Younger, K.C., and *H. S. Preston*, for the respondents, were not called upon.

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March 9.

The judgment of their Lordships was delivered by

SIR GEORGE FARWELL. This is an appeal from the judgment dated October 28, 1913, of the Court of Appeal of New Zealand affirming a declaratory order dated April 3, 1913, of the Supreme Court.

The question depends on the true construction of s. 116, sub-s. 1, of the Harbours Act, 1908, and of clauses 17 and 32 of a contract dated November 11, 1910, and made between the Postmaster-General of New Zealand on behalf of His Majesty of the one part and the defendant company of the other part. Sect. 116, sub-s. 1, of the Harbours Act provides as follows: "Nothing in this Act shall charge with any dues . . . . (*d*) any steamship carrying mails under any contract made with the Postmaster-General in cases where it is provided by the terms of such contract that such steamships shall be exempt therefrom."

It is clear that no agreement inter partes can extend or enlarge the privilege given by this Act. The first and main question therefore is, what is the meaning of a "steamship carrying mails"? and it is best appreciated by taking the facts as arising under the above-mentioned contract. Under clause 17 thereof no charge for harbour dues, dock dues, or other rates was to be made or levied under the Act of 1908 "at the ports of Wellington or Auckland for any of the steamships employed in the services under this contract."

The services under the contract bound the company to carry the mails whenever required from and to New Zealand and San Francisco; and under clause 6 of the agreement such mails were to be conveyed thirteen times in the year (once every four weeks) from Wellington to San Francisco by way of Auckland, Rarotonga, and Papeete, and from San Francisco to Wellington by way of Papeete and Rarotonga. The steamships "carrying mails" under the contract are properly described as "employed in the services under this contract." But the company, under clause 32, obtained liberty to extend the service thereby provided for by continuing the voyage of the vessels employed thereunder, and the conveyance of mails from San Francisco to Wellington to the port of Sydney, and thence back to Wellington or Auckland, but without any payment from the Postmaster-General for the extended

service, and with the duty of providing and maintaining a third vessel, "and such extended service shall be maintained by the company under and subject to all the provisions hereinbefore contained."

Under this liberty the company has frequently carried mails from Australia to the United Kingdom, and from Australia to New Zealand. But these mails are not carried under the contract. Even if the appellants could bring these mails within clause 32 this would not assist the appellants, for the exemption under the Harbours Act is confined to a steamship carrying mails "where it is provided by the terms of such contract that such steamships shall be exempt therefrom," and there is no such provision here; the company is bound to maintain the extended service "under and subject to all the provisions" thereinbefore contained, but there are no words giving it any of the benefits thereinbefore contained. A clause imposing obligations in general terms is a estrictive, not a donative clause. As is familiar in conveyancing when a lease is assigned subject to the covenants and conditions by the lessee, the words "with the full benefit of the lessor's covenants" are added if such benefit is intended to pass.

Then it was argued that whenever any of the company's vessels put into (say) Wellington from Sydney with a cargo, and either with or without mails, with the object and intention of discharging her cargo and then proceeding to San Francisco, she became entitled to exemption from the dues from the moment that she entered the harbour because she then became "a steamship carrying mails under the contract."

But the question is not one of phrases but of substance and fact; it is impossible to predicate of a steamship coming from Sydney with freight and mails for discharge there that she is on entry "a steamship carrying mails under the contract." She is then in truth a steamship about to discharge so as to qualify herself to carry mails under the contract. When she is in harbour for the purpose of receiving and ready to receive the mails, then from the time when her former venture was completed she entered upon her new venture of carrying mails under the contract. This new venture is not postponed until the mails are on board, but commences from the time when she is ready and

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willing to commence and carry out the terms of her contract, and she cannot be so while she remains with cargo wholly or in part undischarged, for she was then on another errand, but as soon as she is ready and willing (and she is not the less ready and willing after discharge of her cargo because repairs, coaling, and the like remain to be done before she can actually receive the mails on board), she answers the description in the Act and contract, and becomes entitled to such immunity as the Harbours Act gives her.

The order as drawn up is in their Lordships' judgment correct, except that under (*b*), for the words "until the outgoing mails are received on board the vessel under by-law No. 55" there should be substituted the words "until she has discharged her former freight and is ready and willing to receive the outgoing mails on board, subject only to coaling, necessary repairs, and the like."

With this alteration their Lordships will humbly advise His Majesty to dismiss the appeal, and that the appellants should pay the costs of the appeal.

Solicitors for appellants: *Peacock & Goddard.*
Solicitors for respondents: *John Holmes & Son.*

[PRIVY COUNCIL.]

BALMUKAND AND OTHERS . . . . . PETITIONERS; J. C.*

AND 1915

THE KING-EMPEROR . . . . . RESPONDENT. *March* 3.

Judicial Committee of the Privy Council—Conviction—Sentence of Death—Petition for Leave to Appeal—Stay of Execution of Sentence—Matter for Executive not for Committee.

Upon a petition to the Judicial Committee for leave to appeal from a conviction and sentence of death, the Judicial Committee will not express any opinion as to postponing execution of the sentence pending the hearing of the petition or appeal, that question being one for the consideration of the Executive and not within the province of the Judicial Committee.

PETITION for special leave to appeal from convictions and sentences of death, and for postponement of the execution of the sentences until the hearing of the petition for special leave and, if granted, until the appeal.

The four petitioners were convicted by the Sessions Judge, Delhi, sitting with three native assessors, upon a charge, under the Indian Penal Code, ss. 120B and 302 (the former section being enacted by Act VIII. of 1913), of criminal conspiracy to murder in pursuance of which conspiracy a murder was committed. Three of the petitioners were sentenced to death and the fourth to transportation for life.

The petitioners appealed to the Chief Court of the Punjab, and the Crown applied to that Court to enhance the sentence upon the fourth petitioner.

The Chief Court affirmed the convictions and sentenced all four petitioners to death. The sentences were to be carried out a few days after the date of the present application, which was made on March 3, 1915.

Sir R. Finlay K.C., and *Dubé*, for the petitioners, stated that they were not at present in a position to proceed with the

* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, SIR GEORGE FARWELL, and MR. AMEER ALI.

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petition for leave to appeal as the transcripts of the judgment of the Chief Court and of the evidence had not yet been received in England; they, however, asked the Board to make an order, or a recommendation to the Government of India, for the postponement of the carrying out of the sentences pending the hearing of the petition.

Dunne, for the Crown.

It was arranged that the petition for leave to appeal should be heard a fortnight after the receipt of the transcripts in England.

1915 *March* 3.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. Their Lordships are unable to advise His Majesty to make any order on the petition for special leave to appeal at this stage.

With regard to staying execution of the sentence of death, their Lordships are unable to interfere. As they have often said, this Board is not a Court of Criminal Appeal. The tendering of advice to His Majesty as to the exercise of his prerogative of pardon is a matter for the Executive Government and is outside their Lordships' province. It is, of course, open to the petitioners' advisers to notify the Government of India that an appeal to this Board is pending. The Government of India will no doubt give due weight to the fact and consider the circumstances. But their Lordships do not think it right to express any opinion as to whether the sentence ought to be suspended. (1)

Solicitors for petitioners: *Barrow, Rogers & Nevill.*
Solicitor for respondent: *The Solicitor, India Office.*

(1) The petitioners were reprieved pending the hearing of the petition for leave to appeal. The petition was finally heard on April 27, 1915, and was dismissed, no ground of appeal being shown which, in their Lordships' opinion, brought the matter within the limited classes of cases in which the Judicial Committee intervenes in criminal proceedings.

[HOUSE OF LORDS.]

CHATTERTON . . . . . APPELLANT;

AND

CITY OF LONDON BREWERY COMPANY, LIMITED . . . . . RESPONDENTS.

H. L. (E.)* 1915 *Feb.* 8.

Bankruptcy—Appeal—Jurisdiction—Receiving Order—Appeal to House of Lords—Refusal by Court of Appeal of Leave to appeal—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 104, *sub-s.* 2.

No appeal lies to the House of Lords from an order of the Court of Appeal affirming a receiving order where the Court of Appeal refuses leave to appeal.

APPEAL from an order of the Court of Appeal affirming a receiving order made against the appellant.

In an action by the respondents against the appellant, who was a solicitor, for a declaration that the appellant was liable for all loss incurred by the respondents in connection with a certain sale by reason of the fraud of the appellant's clerk, the respondents obtained judgment against the appellant in default of defence, and on the failure of the appellant to comply with a bankruptcy notice founded on this judgment, they filed a petition for a receiving order. The appellant opposed the petition and obtained leave from the registrar to go behind the judgment for the purpose of ascertaining whether it was a judgment which ought to be enforced in bankruptcy. After considering all the facts the registrar made a receiving order against the appellant. The Court of Appeal (Cozens-Hardy M.R., Swinfen Eady and Phillimore L.JJ.) affirmed this order and refused leave to appeal to the House of Lords. The appellant nevertheless presented a petition of appeal, and upon the petition being referred to the Appeal Committee it was resolved that the question of the competency of the appeal should be reserved to the hearing.

Cave, K.C., and *A. àB. Terrell*, for the appellant. As to the preliminary objection that under s. 104 of the Bankruptcy Act,

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

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1883, no appeal lies to this House without the leave of the Court of Appeal, the words "orders in bankruptcy matters" in sub-s. 2 are confined to matters in a subsisting bankruptcy after adjudication, i.e., to matters in the administration of the bankrupt's estate. Sub-s. 2 means that when once there has been an adjudication the estate is not to be frittered away in unnecessary appeals, while leaving the question of a receiving order to be subject to the ordinary right of appeal. [They referred to *Lane* v. *Esdaile* (1); *Ellis* v. *Silber* (2); *In re Calthrop.* (3)]

E. Clayton, K.C., and *F. Shewell Cooper*, for the respondents. The only right of appeal in bankruptcy is given by the Bankruptcy Act, 1883. But for s. 104 the appellant could not have gone to the Court of Appeal—see Bankruptcy Act, 1883, ss. 5, 92, 94, 99—and the reason why an appeal lay to that Court is that this was a bankruptcy matter. The petition for a receiving order and the order consequent thereon are intituled "in bankruptcy." The notice of appeal is similarly intituled, and it is a notice that the Court will be moved before the Lords Justices "sitting in bankruptcy." If this is not a bankruptcy matter within s. 104 no right of appeal is given at all.

Cave, K.C., replied.

EARL LOREBURN. My Lords, the question here is a preliminary question, Can there be an appeal from an order of the Court of Appeal supporting a receiving order? Now the Bankruptcy Act of 1883, s. 104, sub-s. 2, says that "Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows:—(*a*) An appeal shall lie from the order of a county court to Her Majesty's Court of Appeal: (*b*) An appeal shall lie from the order of the High Court to Her Majesty's Court of Appeal: (*c*) An appeal shall, with the leave of Her Majesty's Court of Appeal, but not otherwise, lie from the order of that Court to the House of Lords." Now it is quite clear that what is required is the leave of the Court of Appeal, and, as the Court of Appeal in this case refused leave, no appeal will lie

(1) [1891] A. C. 210. (2) (1872) L. R. 8 Ch. 83, at p. 86.
(3) (1868) L. R. 3 Ch. 252, at p. 257.

here provided that the order in question is an order in a bankruptcy matter.

My Lords, it has been argued that this order is not an order in a bankruptcy matter. It has been made by virtue of the bankruptcy jurisdiction by a Court sitting as a Bankruptcy Court, by virtue of the powers which are given only to a Bankruptcy Court. In my opinion it is giving too pregnant a sense to the words of the Act to say that "bankruptcy matters" mean merely matters where there is already a bankruptcy. I think the words "bankruptcy matters" include at all events matters which come within the jurisdiction of the Bankruptcy Court and within the jurisdiction of that Court alone. Were it otherwise, as has been pointed out by the learned counsel for the respondents, the present appellant would not have got as far as the Court of Appeal, and therefore a fortiori would not have been able to arrive here with his arguments.

I consider that this appeal must be dismissed.

LORD ATKINSON. My Lords, I concur.

LORD PARKER OF WADDINGTON. My Lords, I concur.

LORD SUMNER. My Lords, I concur.

LORD PARMOOR. My Lords, I concur.

Appeal dismissed with costs as incompetent.

Lords' Journals, February 8, 1915.

Solicitors for appellant: *Russell & Arnholz.*
Solicitors for respondents: *Young, Jones & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* 1915 Feb. 26.

PWLLBACH COLLIERY COMPANY, LIMITED Appellants;

AND

WOODMAN . . . . . Respondent.

Nuisance—Colliery Company—Coal Dust—Lessees from Common Lessor—Permission to carry on Trade of Miner—Implied Right to commit Nuisance—Derogation from Grant.

A colliery company were sub-lessees of land leased to a tinplate company, with power to that company to carry on on the demised premises the trades authorized by their memorandum of association, which included the trade of miners. A butcher held the adjacent land under a subsequent lease from the same landowner "subject to all rights and easements belonging to any adjoining and neighbouring property," and he built thereon a slaughter-house and sausage factory. Subsequently the colliery company erected on the land demised to them screening apparatus near the butcher's trade buildings and as a result of their screening operations coal dust was deposited on these buildings. In an action of nuisance by the butcher against the colliery company the jury found that a nuisance was caused by the company, but that the screening was carried on in a reasonable manner, and in the way which was usual in the district, and without negligence:—

Held, that the grant of the right to carry on the trade of miners did not authorize the committal of a nuisance, in the absence of proof that the trade could not be carried on otherwise, and that the plaintiff was not precluded by the terms or the circumstances of the grant from obtaining relief.

Hall v. *Lund* (1863) 1 H. & C. 676 explained and distinguished.

Decision of the Court of Appeal affirmed.

Appeal from a decision of the Court of Appeal reversing a decision of Horridge J.

The respondent (hereinafter called the plaintiff), who carried on business as a butcher in Ystalyfera, Glamorganshire, brought an action against the appellants (hereinafter called the defendants), a neighbouring colliery company, for an injunction to restrain them from causing a nuisance by the discharge of coal dust on to his premises as the result of their screening operations, and for damages.

* *Present:* Earl Loreburn, Lord Atkinson, Lord Parker of Waddington, Lord Sumner, and Lord Parmoor.

By a lease dated September 28, 1907, Fleming Gough demised to the Ystalyfera Tin Plate Company, for a term of ninety-nine years from December 25, 1906, certain land at Ystalyfera, together with power to put up such works, erections, and buildings and to carry on such industries and trades on the freehold premises thereby demised as the lessees were by their memorandum of association empowered to carry on. Then followed a long list of trades, which included the trades of coke manufacturers, miners, and smelters. And the lease reserved to the lessor the mines under the demised premises, and the right to work them.

By an underlease dated August 8, 1908, the Ystalyfera Company demised to the defendants for a term of thirty-seven years from March 25, 1908, a portion of the land in question, together with power and authority to lay and maintain railways, sidings, weighbridges, screens, tips and other apparatus, machinery, or erections for the purposes of their colliery works.

By a lease dated May 3, 1909, Fleming Gough demised to the plaintiff for a term of ninety-nine years from March 25, 1909, an adjacent plot of land at Ystalyfera, "subject to all rights and easements belonging to any adjoining or neighbouring property," and the lease reserved to the lessor the mines under the demised premises with the right to work them. The plaintiff shortly afterwards erected a slaughter-house and a sausage factory on this land. In 1912 the defendants erected on the land demised to them screening apparatus and plant, which were put in operation in October of that year. These screens were distant about 130 yards from the plaintiff's premises. The plaintiff complained that the defendants by their screening operations caused a nuisance to his slaughter-house and sausage factory and that the deposit of coal dust from the colliery damaged his meat and sausages.

The defendants by their amended defence denied the nuisance, and, alternatively, alleged that the plaintiff held his lease subject to the rights and easements belonging to any adjoining or neighbouring property; that he took his lease well knowing that Gough was the freeholder of all the adjoining and neighbouring property, including the property held by the defendants, and

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that the defendants had erected and were working their screens under powers theretofore granted by Gough; and further that the plaintiff stood by and acquiesced in and impliedly assented to the erection and user by the defendants of their plant and machinery.

The action was tried before Horridge J. and a special jury at the Glamorganshire Assizes. The jury found that the defendants caused a nuisance which affected the plaintiff's slaughter-house and other buildings; that the screening at the defendants' colliery was carried on in a reasonable manner and in the ordinary way in which such operations were usually carried on in the county of Glamorgan; and that the nuisance was not caused by negligence of the defendants. The learned judge adjourned the trial to London for argument as to the proper judgment to be entered on these findings and eventually directed judgment to be entered for the defendants. He was of opinion that the operations complained of were authorized by the express grant of a right to mine conferred on the Ystalyfera Company, and through them on the defendants, and that the plaintiff, having taken his lease subject to the rights and easements belonging to any adjoining land, could not in the absence of negligence by the defendants complain of injury caused by the exercise of this right.

The Court of Appeal (Cozens-Hardy M.R. and Swinfen Eady and Pickford L.JJ.) held that the lease of 1907 did not confer any right on the defendants to cause a nuisance. They therefore discharged the judgment of Horridge J. and granted an injunction and an inquiry as to damages.

1915. Feb. 4. *Sir Robert Finlay, K.C.*, and *G. Cave, K.C.* (with them *D. Villiers Meager*), for the appellants. Both the appellants and the respondent acquired their lands by lease from a common owner, the respondent's lease being subsequent to the appellants', and the respondent took his lease expressly subject to all rights and easements belonging to any neighbouring property. The question is what is the true construction of the grant to the appellants' predecessors in title, the Ystalyfera Company, of the right to carry on the trade of miners. If an owner of land gives to

his lessee the right to carry on a particular business on the demised premises, he gives him the right to carry it on in the usual way so long as he carries it on without negligence. The grant of a right to carry on a particular business means the business with all its natural and usual incidents, and if the business of mining involves the screening of the coal in this particular way the respondent cannot complain, even though it may cause him annoyance. The findings of the jury as they stand show that the thing complained of in the action is the very thing which was authorized by the lease under which the appellants derive their title. The Court of Appeal doubted whether the right to deposit coal dust could be an easement, but it was so treated by the House of Lords in *Royal Mail Steam Packet Co.* v. *George & Branday*. (1) This case falls within the principle of *Lyttelton Times Co.* v. *Warners* (2), *Jones* v. *Pritchard* (3), and *Hall* v. *Lund*. (4) In the last cited case it was held that the grant of a right to carry on a bleaching business involved the right to pollute a stream because such pollution was a natural incident of carrying on such business; the implication was not put upon necessity. So here screening is a natural incident of carrying on a mining business. Having regard to the nature of the grant in this case, the test is not whether it was possible to carry on the authorized trade without committing a nuisance, but whether that trade was being carried on in a customary and reasonable manner and without negligence. In a colliery district there must always exist a state of things which people living in a residential district would regard as a nuisance, but the question must be looked at with a due regard to the surrounding circumstances.

Micklem, *K.C.*, and *Griffith Jones*, for the respondent, were not called upon.

The House took time for consideration.

Feb. 26. EARL LOREBURN. My Lords, in this case Mr. Woodman, a butcher in Glamorganshire, sued a neighbouring colliery company in respect of a nuisance caused to him in his trade by their

(1) [1900] A. C. 480.
(2) [1907] A. C. 476.
(3) [1908] 1 Ch. 630.
(4) 1 H. & C. 676.

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screening and breaking operations. These operations discharged coal dust which was carried by the wind to plaintiff's premises and injured him in his trade. The jury found that this was a nuisance, but that the operations of the company were carried on in a reasonable manner and in the ordinary way in which such operations are usually carried on in the county of Glamorgan. Also they found that the nuisance was not caused by the negligence of the company. At the trial judgment was entered for the defendant company, but the Court of Appeal reversed that judgment, and now it comes before your Lordships.

It is quite clear that if a nuisance has been committed no one can excuse it by simply saying "I only did what is usually done in this county, and I was not in any way negligent." No doubt the character of the locality may be considered when the question is whether or not there has been any nuisance, but here that question is settled by the jury's verdict. Nor is it material that the company are absolved from negligence. Their duty to their neighbour is not merely to take care so as to avoid causing a nuisance. Their duty is to abstain from causing one at all, unless, of course, they have a right to cause one, as, for example, by statute or by consent of the complaining party or of some one whose consent binds him. Such consent may be proved like any other question of fact. It may appear from the conduct of the parties and the surrounding circumstances, as in *Hall* v. *Lund* (1), or as in *Lyttelton Times Co.* v. *Warners* (2), where both parties agreed that the very thing which was done should be done, though neither of them expected that it would cause a nuisance. It is a question of fact, but if in ascertaining the fact it becomes necessary to put a construction upon a document, then it is the function of a Court of law to construe the document in the ordinary way.

In the argument at your Lordships' Bar this point of consent was the matter really pressed on behalf of the appellants, and the only point that could be pressed with any regard to the law. Counsel for the company said that they held their colliery by an underlease under a lease of 1907 from Mr. Gough, and that by virtue of the lease they had a right to carry on the colliery business in a reasonable and usual manner, even if it caused a

(1) 1 H. & C. 676. (2) [1907] A. C. 476.

nuisance to Mr. Gough or to those who by subsequent demise should derive title from him. They also said that the plaintiff, Mr. Woodman, held the premises (for a nuisance to which the action is brought) under a lease from the same Mr. Gough, dated in 1909, "subject to all rights and easements belonging to any adjoining or neighbouring property," and that therefore he could not complain of the nuisance, which had been expressly authorized beforehand by the common lessor from whom he took his lease.

Questions were raised whether or not the right of spreading coal dust over adjoining premises constitutes an easement in law, whether a servient tenement must have certain boundaries, whether Mr. Woodman was bound or not bound by this clause in the lease of 1907. It is unnecessary to enter upon these questions because, in my opinion, the lease of 1907 does not authorize any one to commit a nuisance. In that lease the lessees, who were a limited company, are licensed by Mr. Gough "to carry on such industries and trades on the freehold premises hereby demised as the lessees are by their memorandum of association empowered to carry on," and then a number of industries are specified. Among others are those of miners and smelters. That is all. To my mind it is clear that permission to carry on a business is quite a different thing from permission to carry it on in such a manner as to create a nuisance. If, indeed, it could be proved that the business authorized could not possibly, in a practical sense, be carried on without committing a nuisance, so that every one must have known the purpose was to commit a nuisance, or if some particular method of carrying it on had been authorized, which being faithfully observed had nevertheless necessarily resulted in an unexpected nuisance being committed, then it would have been different. But no question was asked of the jury raising such a case, nor was any such case raised in the pleadings or argued here, if, indeed, it could have been argued at this stage. Nothing was relied upon beyond the clauses in the lease of 1907, together with the findings of the jury that the appellants' operations were carried on in a reasonable manner as usual in the county, and without negligence. In these circumstances the case stands upon the fact that the

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company committed a nuisance which they cannot excuse, and the order of the Court of Appeal ought in my view to be affirmed.

LORD ATKINSON. My Lords, I concur. The appellants are sub-lessees under a lease dated August 8, 1908, from the Ystalyfera Tin Plate Company, Limited, of certain lands and premises situated at Ystalyfera, in the parish of Llanguick in Glamorgan, held by the latter company under a lease dated September 28, 1907, from one Fleming Gough for a term of ninety-nine years.

It is not disputed that, for the purposes of the present case, it may be assumed that the sub-lessees, the appellants, stand in the same position and are clothed with the same rights as to the user of the demised lands as were their lessors. The respondent holds lands adjoining those sub-demised to the appellants, demised to him also by the same Fleming Gough by a lease dated May 3, 1909, and therefore subsequent in date to the lease granted to the Ystalyfera Company.

In the year 1909 the respondent erected a building on the lands demised to him which he used as a slaughter-house, sausage factory, and place for storing chilled meat, &c. In the year 1912 the appellants erected on their own lands, within about 130 yards of the respondent's slaughter-house, certain buildings in which they carried on the business of breaking, screening, and washing coals. The respondent complains that the coal dust created by these operations is carried from these works in large quantities to his slaughter-house and sausage factory, and penetrates into them, injuring his meat and sausages, so as to be to him a nuisance, and he brings the action out of which this appeal arises for damages, and for an injunction against the continuance of this nuisance.

The jury, in answer to questions put to them by Horridge J., the learned judge who presided at the trial, have given the answers already mentioned.

The lease of September 28, 1907, authorized and empowered the lessees to put up works and erections and to carry on between twenty and thirty different trades, one of which was that of "miners," but the minerals under the demised lands were reserved to the lessor. The appellants contend that, by reason

of this provision empowering them to carry on the trade of "mining," a grant to them is to be implied of the right or privilege or easement, if it can be properly so called, to carry on this work in such a way as to cause the nuisance complained of or any like nuisance to any one deriving any part of Fleming Gough's land under an instrument later in date than September 28, 1907; that the premises demised by this latter instrument stand to the adjoining portions of Fleming Gough's property in the relation of a dominant to a servient tenement; and that the respondent took his premises subject to this right or privilege so impliedly granted, even though it caused a nuisance such as is complained of.

It was argued on behalf of the appellants that the second finding of the jury was sufficient to justify the appellants in causing this nuisance. The finding is, however, far short of a finding that the creation of the nuisance was necessary for the exercise of the right or the enjoyment of the privilege or easement claimed to be granted to the lessees. Even assuming that the operation of breaking up, washing, and screening coals is an ordinary operation of mining, and therefore covered by the words of the lease, it is quite consistent with the second finding that there may be other methods of doing all these things, reasonably practical in character, none of which would cause the nuisance complained of. In this fact lies the fatal defect and insufficiency in the verdict of the jury as a justification of the appellants' action. I should myself have thought that the law was clear upon this point, but, as it was so resolutely contended that the appellants were not bound to establish that the operations causing the nuisance were *necessary* for the enjoyment by them of the right or privilege they claimed, it is desirable to refer to a few authorities on the point.

In *Liford's Case* (1) the following maxim is given as expressing the rule of law applicable to grants: "Lex est cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit." In Plowd. Com. 16a the law is laid down in substantially the same words. In *Pomfret* v. *Ricroft* (2) the same maxim is set out as a correct statement of the law.

(1) (1614) 11 Rep. 46b, at p. 52a.
(2) (1669) 1 Saund. (1845 ed.) at p. 322 (e).

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In *Senhouse* v. *Christian* (1) the question was whether under a grant of a free and convenient way over a certain close for carrying coals, amongst other things, the grantee had a right to lay down a paved waggon-way. And Ashhurst and Buller JJ. laid it down that it was clear that the grantee had the right to use the way in any manner that was necessary for the purpose of enjoying the privilege so granted. Buller J. said: "It was granted to him (the grantee), that he should have a free and convenient way for several purposes stated in the deed, amongst others, that of carrying coals; and it is found by the jury, that he cannot so conveniently carry his coals, unless he has a paved waggon-way. Then, if such a way be necessary for the purpose of carrying the defendant's coals, he has a right, according to the terms of the grant, to make it." And Sir James Wigram, in *Blakesby* v. *Whieldon* (2), founding himself on these two cases, laid down the law thus: "The general principle of law, that, where a person makes a grant of any given thing, he impliedly grants that also which is necessary to make the grant of the principal subject effectual, does not admit of dispute."

In *Hinchliffe* v. *Earl of Kinnoul* (3), which was a case concerned with a right of way in which the jury had returned a special verdict, Tindal C.J., in delivering the judgment of a Court composed of Vaughan, Bosanquet, Coltman JJ., and himself, at p. 24, said: "We are of opinion that, upon the facts found in this special verdict, such right (i.e., the right of way) did pass as a necessary incident to the subject-matter actually demised." He then cites the passage from Plowden's Commentary already referred to, and says: "Twisden J. in *Pomfret* v. *Ricroft* (4) lays down the rule of law to be 'when the use of a thing is granted, every thing is granted by which the grantee may have and enjoy such use. As if a man gives me a license to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me.'" The special verdict had found that the right of way was not only convenient but necessary for the use of the lessee's premises.

(1) (1787) 1 T. R. 560.
(2) (1841) 1 Hare, 176, at p. 180.
(3) (1838) 5 Bing. N. C. 1.
(4) 1 Saund. 322 (e).

From these authorities it is, I think, clear that what must be implied is, not a grant of what is convenient, or what is usual, or what is common in the district, or what is simply reasonable, but what is *necessary* for the use and enjoyment, in the way contemplated by the parties, of the thing or right granted.

Three cases, however, were cited by the appellants' counsel in support of their contention on this point. First, *Hall* v. *Lund*. (1) In that case a lessee of a mill carried on for a number of years on the premises demised the trade or business of a bleacher. In the course of this business he discharged into a certain watercourse, the property of his lessor, about seven times each fortnight, water used, and in the using fouled, in his own works, thereby polluting the water in the watercourse. The lessee surrendered his lease, and a new lease was made by this same lessor to a lessee described in it as a "bleacher," the premises demised being themselves described as the premises late in the occupation of the former lessee. By the last clause of the new lease it was provided that all buildings erected by the lessee for the purpose of carrying on the bleaching business should at the end of the term belong to the lessor. It was held that there was an implied grant to the lessee of the right to use this watercourse, as the former tenant had used it, for the purpose of carrying on the bleaching business.

That case, however, was wholly different from the present. Here the works causing the nuisance were erected and worked during the term. There was no user antecedent to the grant of the lease of any portion of these premises for a business such as the appellants carried on in them. The ground of the decision, as stated by Martin B., at p. 681 of the report, shows that the case had no application to the present case. He said: "In ascertaining what passed by a conveyance evidence may be given of the state of the property at the time it was conveyed and of the mode in which it had been enjoyed." And again, at p. 684, relying on the authority of *Ewart* v. *Cochrane* (2), he said: "where there is a demise of premises with which certain rights have been usually enjoyed, it must be taken that the lessor has granted those rights."

(1) 1 H. & C. 676.

(2) (1861) 4 Macq. 117.

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The next case was that of *Royal Mail Steam Packet Co.* v. *George & Branday.*(1) In that case the plaintiffs and defendants were owners of two wharves on the harbour of Kingston in Jamaica, separated the one from the other by a street called Duke Street. From the year 1841 till the date of trial the defendants kept coal stores on their wharf, and loaded and unloaded coals thereat. It was common ground between the parties that the defendants had by this user acquired a prescriptive right to continue this practice of loading and unloading coals, though it had constituted an annoyance to the plaintiffs. The action was brought, not for the nuisance caused by the exercise of this prescriptive right, but upon the allegation that the defendants had made alterations in the structure of their works, and in the mode of conducting their business, which had produced injurious effects in excess of those which would have been produced by the exercise of the prescriptive right. The judge at the trial left to the jury the question whether the appellants had by this alteration of structure and change of practice caused greater injury to the respondents' works *taken as a whole* than they had caused before the change. The Judicial Committee held that this was not the question which should have been left to the jury, but the question whether by this extension and alteration of the appellants' works there had been a variation in the kind of servitude imposed on the respondents substantial enough to cause a new and appreciable wrong; that this was a question of fact which must be found by the jury, and that consequently there should be a new trial. The case has not, in my view, any application whatever to the present case.

In the third case, *Lyttelton Times Co.* v. *Warners* (2), the appellants and respondents had agreed that the appellants' printing house should be rebuilt, and that the upper part of it should be let to the respondents to be used as bedrooms in connection with their adjoining hotel; that the appellants were to have the ground floor for their own use as an engine-house, and for a printing machine for the prosecution of their business. The parties thus expressly contracted that the ground floor of the appellants' house should be used for a specific purpose, which,

(1) [1900] A. C. 480.

(2) [1907] A. C. 476.

of course, meant reasonably and properly used for that purpose. There was no evidence that this machinery had been improperly or carelessly worked, but it was an undoubted fact that both parties were under the impression at the time they entered into the agreement that the proper working of the machinery would not cause vibration and noise, such as it afterwards did cause. It was held that no action lay. Here nothing was done but the particular thing which it was contracted and agreed should be done. It was the effect which resulted from the carrying out of the contract that the parties were mistaken about.

In the present case the matter in controversy is the nature and terms of the contract made, not what would follow from the legitimate carrying out of its terms when ascertained.

On this point by itself the appellants must, in my view, fail. The appeal should, I think, be dismissed, with costs. Having come to this conclusion, it is unnecessary for me to express any opinion on the other point dealt with in the Court of Appeal.

Lord Parker of Waddington. (1) My Lords, in the present case the jury have found the defendants guilty of nuisance. The nuisance consists in allowing a quantity of coal dust to escape from their works on to and into the plaintiff's shop, to the damage of the sausages and meat which the plaintiff keeps and sells there. There is no question as to the existence of the nuisance itself, but the defendants claim a right to commit it, and the existence or non-existence of this right is the point which your Lordships have to decide.

The defendants claim the right in question under or by virtue of an indenture of lease dated September 28, 1907, and made between Fleming Gough, the plaintiff's predecessor in title, of the one part, and the Ystalyfera Tin Plate Company, Limited, from whom the defendants derive title, of the other part. It is admitted that if the lease in question operated to create the right, such right is now vested in the defendants, and that the plaintiff, who acquired his shop from Fleming Gough after the date of the lease, is bound to submit to its exercise. The only question,

(1) Read by Lord Parmoor.

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therefore, is whether the lease in question operated to create the right.

The terms of the lease are sufficiently known to your Lordships, and I will refrain from stating them in detail. There is no express grant of the right alleged; it is said to be created by implication. The premises demised were partly freehold and partly leasehold, and the lease contained a power for the lessees to put up such buildings, and to carry on such industries and trades on the freehold premises, as the lessees were by their memorandum of association empowered to carry on and be engaged in, these industries and trades being specified in the words of the memorandum and including (inter alia) the business of miners. There is nothing to show that any part of the freehold premises was then used for mining purposes.

My Lords, the right claimed is in the nature of an easement, and apart from implied grants of ways of necessity, or of what are called continuous and apparent easements, the cases in which an easement can be granted by implication may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted. The principle is expressed in the legal maxim "Lex est cuicunque aliquis quid concedit concedere videtur et id sine quo res esse non potuit." Thus the right of drawing water from a spring necessarily involves the right of going to the spring for the purpose. The implication suggested in the present case does not fall under this principle; there is no express grant of any right to which the right claimed must be necessarily ancillary, nor is there any evidence that the nuisance is necessarily incidental to the defendants' mining operations.

The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land

retained by the grantor is to be used. See *Jones* v. *Pritchard* (1) and *Lyttelton Times Co.* v. *Warners.* (2) But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use.

Thus in *Jones* v. *Pritchard* (1) it was obviously the intention of the parties that the chimney flues connected with the grantor's house should continue to be used by the grantor to get rid of his smoke, notwithstanding that a moiety thereof was conveyed to the grantee, and similarly that the flues connected with the grantee's premises should be used to get rid of the grantee's smoke, notwithstanding that a moiety thereof was retained by the grantor. There was no difficulty, therefore, in implying the appropriate easements.

Similarly in *Lyttelton Times Co.* v. *Warners* (2) the lessor was doing on property retained by him precisely what both parties at the time of the grant contemplated that he should do, neither more nor less, and under these circumstances the Court implied a reservation of the right to do it, notwithstanding that it occasioned a nuisance to the grantee. *Richards* v. *Rose* (3) is a similar case. In *Hall* v. *Lund* (4) the decision may be explained on the doctrine of continuous and apparent easements, but it is equally explicable on the principle I am now considering. The common intention of the parties in that case may well have been that the bleaching works, the subject of the demise, should be carried on by the lessee in precisely the same manner as had theretofore been the case, the refuse therefrom being turned as theretofore into the natural watercourse which flowed through the lessor's property. I think, however, that Wilde B. states the principle somewhat too broadly. "A demise," he says, "of a brewery would carry with it the right to use the premises for brewing; although that might be a nuisance to the lessor or his assigns. So, if a mill were demised the lessee would have a right to grind

(1) [1908] 1 Ch. 630.
(2) [1907] A. C. 476.
(3) (1853) 9 Ex. 218.
(4) 1 H. & C. 676.

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there, although the noise might annoy the lessor or his assigns." It is true that a demise of an existing brewery or an existing mill would probably connote a common intention that the brewery or mill should be worked in the manner in which it had been worked prior to the demise, and therefore that if so worked it caused a nuisance to the lessor, he could not be heard to complain. But I doubt whether this would hold if the method of working were subsequently altered and a nuisance thereupon ensued, even though it might be proved that this method of working was the usual method, and that the lessee had been guilty of no negligence.

My Lords, if, as I think, the principle is as above stated, the real question is whether the use of the screens which occasioned the coal dust was in the contemplation of the parties when the lease was granted. There is no evidence of any circumstance pointing to such an intention. The lessee company was a tin-plate company and even if it had power to carry on the business of coal mining there is no evidence that it ever did so or ever intended to do so. The business of coal mining now carried on on the demised premises appears to have been started by the defendants, and it is only recently that the defendants have commenced to use the screens which occasioned the dust. There appears, therefore, to be no room for any implication based on common intention.

In my opinion, therefore, the defendants cannot justify the nuisance in respect of which this action was brought, and the appeal therefore ought to be dismissed with costs.

LORD SUMNER. My Lords, in order to succeed in this case the appellants must show that the Ystalyfera lease of 1907 ought to be construed as authorizing them to injure the respondent by committing the nuisance which was established by the verdict found at the trial.

Like the Court of Appeal, I doubt whether their alleged right is an easement properly so called. It is highly indefinite. It amounts to a claim to spread their coal dust in injurious quantities anywhere over the lessor's land, in any direction and to any distance, just as the wind, blowing where it listeth, may

chance to carry it. The area and the limits of this servient tenement, if such it should be called, are determined only by ownership by the lessor and contiguity to the appellants' premises. For the reason given by Lord Blackburn (*Dalton* v. *Angus* (1)) in explaining why at common law there is no easement to have an uninterrupted view over another's landscape, namely, that anything "which would impose a burthen on a very large and indefinite area should not be allowed to be created, except by actual agreement," I think this right is too indeterminate to be an easement proper.

There is, however, no doubt that by the use of apt and sufficient words such a right may be created by grant. The deposit of coal dust on another's close may be the subject not of a mere covenant not to prevent it, but of an actual grant of the right to do it. Hence it is not necessary to ask whether such a right would pass under the general words "easements and appurtenances," which, indeed, this lease does not contain; it is enough to ask if the lease expresses or implies it. The appellants contend that it does.

The lease does not demise this washing plant as an existing building, for it had not been erected at its date, a point which goes far to distinguish the authorities relied on. Power is given to put up erections for, and to carry on, the trade of miners. This clause is in its nature restrictive; it limits to the company's corporate powers those general lawful uses which a natural person would have inferentially enjoyed. I cannot see how this can be read so as to empower the company to erect and use a coal-mining washing plant, even at the cost of causing a nuisance to the neighbours. There will be no derogation from the lessor's grant, if he, or those claiming under him, successfully resist such an injury, for the appellants will still enjoy the full benefit of reasonable and careful use of the plant, and ample effect will have been given to the words used. There is no finding that they cannot do so without committing a nuisance, nor is a washing plant that will bespatter the countryside with coal dust shown to be an indispensable instrument of coal mining. I think the cases cited are all distinguishable. *Hall* v. *Lund* (2)

(1) (1881) 6 App. Cas. 740, at p. 824.

(2) 1 H. & C. 676.

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is the case of a lease of a building with the apparent easements or quasi-easements theretofore enjoyed with it, which included a right to foul a stream. But for that prior enjoyment the right implied would not have extended beyond a reasonable use of the premises themselves. This case is not in point. In the *Lyttelton Times Case* (1) a certain building was erected for the occupation of both parties, and then an agreement was entered into between them by which the one who was the owner of it leased to the other that portion which had been erected for his use. In the course of occupation each was doing the very kind of thing for which the building had been erected. It was held that each must take it as he found it. In the absence of language to the contrary each might, without objection, use in the contemplated way the building erected for the purposes of both. It again does not touch this case.

In the same way I think that the principle of *Jones* v. *Pritchard* (2) is the converse of the appellants' claim here. There it was found that the particular use of the premises which was in question was actually contemplated between the parties to the instrument in suit when it was entered into—in other words, there was the equivalent of a grant of that use. The only limit in such grant was held to be reasonable care in its use; if, notwithstanding care, the use caused a nuisance to the other party, that was the very thing that was granted. In the present case the question is whether the right to commit a nuisance is granted at all, care or no care. I think it was not; in *Jones* v. *Pritchard* (2) it was, or that was granted which involved it. The case is distinguishable. No other authority was relied on, nor can I see how the appellants' construction can succeed in principle. I think the appeal fails.

Lord Parmoor. My Lords, this case depends upon the construction of a provision contained in a lease dated September 28, 1907, made by Fleming Gough of the one part and the Ystalyfera Tin Plate Company of the other. By an indenture of underlease dated August 8, 1908, and made between the Ystalyfera Company of the one part and the appellants of the other part,

(1) [1907] A. C. 476. (2) [1908] 1 Ch. 630.

the Ystalyfera Company granted and demised to the appellants for a term of years certain of the lands comprised in the said lease, on which the appellants have subsequently erected plant and buildings for the screening and washing of anthracite coal. On the land so demised to them the appellants, as sub-lessees of the original lessees, the Ystalyfera Company, have "power to put up such works erections and buildings and to carry on such industries and trades on the freehold premises hereby demised as the lessees are by their memorandum of association empowered to carry on and be engaged in that is to say, steel makers iron masters builders and contractors builders' merchants brick-makers coke manufacturers miners smelters engineers tinplate terneplate and blackplate manufacturers iron and brass founders mechanical engineers machine and engineering tool makers boiler makers and steel converters and manufacturers and dealers in machinery rolling stock iron steel metal implements tools and utensils."

By an indenture dated May 3, 1909, and made between the said Fleming Gough of the one part and the respondent of the other part, the said Fleming Gough demised to the respondent for a term of years a certain piece or parcel of land at Ystalyfera on which in the summer of 1911 he erected a slaughter-house and a wooden shed used as a sausage factory, and also at various dates a row of twelve houses called Woodman Terrace.

In October, 1912, the appellants brought into operation some new plant and machinery, for breaking, sizing, and washing coal, situated on the property demised to them by the Ystalyfera Company. The jury have found that the coal dust produced and disseminated by this new machinery and plant of the appellants caused a nuisance to the respondent's slaughter-house and other buildings, but did not cause a nuisance to the respondent's houses in Woodman Terrace, and further found that the screening at the appellants' works was carried on in a reasonable manner and in the ordinary way in which such operations are usually carried out in the county of Glamorgan. The learned trial judge on these findings ordered that verdict and judgment should be entered for the appellants. This judgment was reversed in the Court of Appeal.

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The appellants cannot succeed unless they can establish that the term of the lease of September 28, 1907, quoted above, authorizes them, as sub-lessees from the Ystalyfera Company, to carry on the business of miners so as to cause a nuisance over the adjoining property of the lessor, and that the respondent, in respect of the said slaughter-house and wooden shed, holds, under his demise, subject to this right or easement conferred in the prior lease. It is not contended that the covenant in question directly authorizes the original lessees or the appellants to carry on any business so as to cause a nuisance to the adjoining property of the lessor, but it is said that such a right can be, and ought to be, inferred by implication, as being the common intention of the parties, so long as the business is carried on without negligence and in a manner usual in the district.

My Lords, I confess that I am quite unable to understand this contention unless it can be said that it is practically impossible to carry on the business of mining upon the demised site without causing a nuisance. In the present case there is no evidence that it was in any way necessary, in order to carry on the business of mining, to cause a nuisance, and all the circumstances point to a different conclusion. The nuisance was not complained of until the new plant and machinery came into operation in October, 1912, and up to that date the mining business had been carried on under conditions so that no nuisance was occasioned.

The provision relied on in the lease of September 28, 1907, is in truth a covenant of restriction, and not a covenant enlarging the rights of the lessee. Apart from this provision the appellants might, so far as appears, have carried on any business upon the land in question subject, no doubt, to the ordinary obligation not to commit a nuisance. The provision, so far as it is effective, restricts the character of the businesses which may be carried on to those contained in the memorandum of association of the Ystalyfera Company, and it is an extravagant proposition that authority given to a company to carry on any business according to their memorandum of association authorizes, by implication, the carrying on of such business so as to cause a nuisance to the

occupier of the adjoining property of the lessor, and that this was the common intention of both parties to the lease.

I desire to express my concurrence in the judgment of Pickford L.J.: "The highest the case can be put in favour of the defendants is that Gough and his tenant, the plaintiff, are under an obligation (using the language of Lord Loreburn in the case to which we were referred) not to frustrate the purpose for which, in the contemplation of both parties, the land was hired, and, therefore, the defendants would have to make out that to restrain the carrying on of the business as a nuisance must frustrate the object for which the land was hired, namely, the carrying on of the business of mining upon it."

My Lords, in my opinion it is not material to decide whether an easement has been granted over the land on which the premises occupied by the respondent are situated, since if, on the construction of the lease, a right—other than an easement—has been given to carry on the mining business so as to create a nuisance, the lessor could not by a subsequent lease have derogated from his previous grant, and the appellants would have been entitled to succeed in their appeal.

In my opinion the decision of the Court of Appeal is right, and the appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, February 26, 1915.

Solicitors for appellants: *White & Leonard, for William Jones, Swansea.*

Solicitors for respondent: *John T. Lewis & Woods, for J. Moy Evans, Swansea.*

[HOUSE OF LORDS.]

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SHARPNESS NEW DOCKS AND GLOUCESTER AND BIRMINGHAM NAVIGATION COMPANY . . . . . } APPELLANTS;

AND

ATTORNEY-GENERAL (AT THE RELATION OF THE MAYOR, &c., OF THE CITY OF WORCESTER) . . . . . } RESPONDENT.

Bridge—Canal made across Highway—Highway carried by Bridge over Canal—Statutory Duty to keep Bridge "in sufficient repair"—Standard of Repair—Worcester and Birmingham Canal Act, 1791 (31 *Geo.* 3, *c.* 59), *s.* 61.

An Act passed in 1791 empowered a canal company to make a canal and provided that the company should not make the canal across any highway until they should at their own proper charges have made such bridges over the canal and of such dimensions and in such manner as the commissioners appointed under the Act should adjudge proper, and that all such bridges should "from time to time be supported, maintained, and kept in sufficient repair" by the company.

The canal, which was completed in 1812, was made across several highways in an urban district, and the company made bridges over the canal in accordance with the requirements of the commissioners to carry such highways.

In an action by the Attorney-General, at the relation of the urban authority, against the company for a declaration that they were liable to keep the bridges in repair so as to be sufficient to bear the traffic which might reasonably be expected to pass along the highways carried over the canal by the said bridges, having regard to the present character and needs of the district:—

Held, that the company were only liable to keep the bridges in repair in the condition in which they were made in accordance with the requirements of the commissioners.

Dictum of Fletcher Moulton L.J. in *Hertfordshire County Council* v. *Great Eastern Ry. Co.* [1909] 2 K. B. 403, at p. 412, considered.

Decision of the Court of Appeal [1914] 3 K. B. 1 reversed.

APPEAL from an order of the Court of Appeal (1) reversing or varying a judgment of Phillimore J. (2)

* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, and LORD PARMOOR.

(1) [1914] 3 K. B. 1. (2) [1913] 1 K. B. 422.

By the Worcester and Birmingham Canal Act, 1791 (31 Geo. 3, c. 59), the Company of Proprietors of the Worcester and Birmingham Canal Navigation, who were the predecessors in title of the appellants, were authorized to make a canal from Birmingham to join the river Severn at Diglis near Worcester. By s. 20 commissioners were appointed for settling and adjusting all differences which might arise between the company and the several proprietors and other persons interested in lands that might be affected by the execution of the powers granted by the Act and other matters, and by s. 87 provision was made for the election of new commissioners. By s. 61 ". . . . the said company of proprietors shall also, at their own charges, make, erect, and set up, and from time to time maintain and support, ... such bridges, arches, culverts, drains, and passages, over, under, by the side of, or into the said canal, and the trenches and aqueducts communicating therewith, and the towing paths on the sides thereof, of such dimensions, and in such manner, as the said commissioners shall from time to time judge necessary and appoint . . . .; and the said company of proprietors shall not make the said canal, or any trench, in or across any common highway, publick bridle way, or foot path, until they shall, at their own proper charges, have made and perfected such bridges, passages, or arches across such highway, bridle way or path, and of such dimensions, and in such manner, as the said commissioners shall adjudge proper; and all such . . . . bridges, arches and other works and conveniences to be made, shall, from time to time, be supported, maintained, and kept in sufficient repair, by the said company of proprietors."

The canal was constructed about the year 1812. It passed through the city of Worcester and was made across several common highways within the city and also several common highways then outside but now within the city, and bridges were made over the canal to carry these highways.

By the Gloucester and Berkeley Canal Act, 1874 (37 & 38 Vict. c. clxxxi.), the canal was vested in the appellants subject to the obligations and liabilities of the original company.

In 1911 the Attorney-General, at the relation of the corporation of the city of Worcester, commenced an action against the

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appellants, claiming (1.) a declaration that the appellants were liable to support, maintain, and keep in repair certain bridges in the claim specified, which carried common highways over the appellants' canal within the city of Worcester, sufficient to bear the ordinary traffic of the district and the traffic which might reasonably be expected to pass along the said highways having regard to the present character and needs of the district; (2.) an injunction restraining the appellants from allowing the said bridges to remain in such a condition as to hinder and endanger His Majesty's subjects from passing and repassing over and along the said highways and bridges with the ordinary traffic of the district, and requiring the appellants forthwith to support, maintain, and keep in sufficient repair the said bridges and each of them.

The appellants by their defence alleged that they were not bound to keep the bridges in a state of repair sufficient to bear the ordinary traffic which might reasonably be expected to pass along the highways carried over the canal by the said bridges having regard to the present character and needs of the district served by the said highways; but only so as to carry such traffic as was ordinary on such highways when the bridges were originally constructed.

At the trial it was admitted that the bridges in question were approved and adjudged proper by the commissioners appointed by the Act in that behalf; that some of the bridges were not in sufficient repair to enable them to carry the ordinary traffic of the present time, and that some of them were not even in such a state as to enable them to carry such traffic as was ordinary at the time when the bridges were originally constructed.

Phillimore J. declared that the appellants were liable to support, maintain, and keep in repair all the bridges mentioned (other than a bridge called Lowesmoor Bridge as to which he reserved the action for further consideration) to bear such traffic as was ordinary and might reasonably have been expected to pass upon the highways serving the said bridges at the time of the making of the bridges.

The Court of Appeal (Vaughan Williams, Kennedy, and Swinfen Eady L.JJ.) varied the order of Phillimore J. by declaring that

the appellants were liable to support, maintain, and keep in repair each of the said bridges (reserving Lowesmoor Bridge) sufficient to bear the ordinary traffic of the district which might be reasonably expected to pass along the highways in question.

1914. Dec. 15, 16. *Sir Robert Finlay, K.C.*, and *Macmorran, K.C.* (with them *E. W. Cave*), for the appellants. The obligation of the appellants is confined to maintaining bridges of the same strength as originally ordered by the commissioners appointed by the Act. The fact that the bridges are to be constructed to the satisfaction of the commissioners and to be so repaired is an indication that the bridges were intended to bear the ordinary traffic at the date when they were constructed. The measure of liability must depend upon the terms of the particular statute, which provides as the test the standard required by the commissioners. This is not a common law obligation at all, and all the common law doctrine as to highways is inapplicable. The appellants are only bound to support, maintain, and keep in repair such bridges as the commissioners had in their contemplation and are not bound to reconstruct such bridges in consequence of the increase of traffic. *Hertfordshire County Council* v. *Great Eastern Ry. Co.* (1), upon which the Court of Appeal proceeded, is distinguishable, inasmuch as it was a decision on a different statute couched in different language, and further it was wrongly decided. Lord Alverstone C.J. was not right in holding that the undertakers were under a common law liability to repair bridges made under a private Act and carrying a highway, unless the Act expressly excluded the common law rule, and the dictum of Fletcher Moulton L.J. also goes too far. But further the analogy of the common law is against the claim made in this action: *Rex* v. *Inhabitants of Devon.* (2) *Reg.* v. *East and West India Dock Co.* (3) is analogous to the present case.

G. Cave, K.C., and *J. B. Matthews, K.C.* (with them *W. W. Mackenzie, K.C.*), for the respondent. It is the duty of the appellants both at common law and under their special Act to

(1) [1909] 2 K. B. 403. (2) (1825) 4 B. & C. 670, at p. 679.
(3) (1888) 60 L. T. 232; 53 J. P. 277.

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provide and maintain efficient substitutes by means of bridges for such parts of the highways as have been cut through and destroyed for the purpose of their canal. In determining the standard of maintenance and repair it is not enough to take the statute alone, for the words are quite general, but recourse must be had to the common law. The standard contended for by the respondent is a varying standard measured by the needs of the public for the time being. The standard contended for by the appellants is a fixed standard; but the appellants' contention is open to the objection that it is obviously inconvenient to the public that there should be one standard for the highway and another for the bridges carrying the highway. If the canal company are not bound to adapt their bridges to modern traffic nobody else is bound or entitled to do so, and the result would be very serious and even absurd from the point of view of the ordinary travelling public. The true standard is the standard of the ordinary traffic of the present day. It is a reasonable construction of the statute to put the public in the same position as they would have been in if the highways had not been cut. The words "support and maintain" are sufficient to cover reconstruction if the obligations of the statute cannot be performed otherwise. The authorities show that when a public highway is cut by a canal or railway there is an implied obligation on the undertakers to give the public the same facilities of passage as existed before: *Rex* v. *Kerrison* (1); *Rex* v. *Inhabitants of Kent* (2); *Rex* v. *Inhabitants of Parts of Lindsey* (3); *Manley* v. *St. Helens Canal and Ry. Co.* (4); *Reg.* v. *Inhabitants of Ely.* (5) *Hertfordshire County Council* v. *Great Eastern Ry. Co.* (6) recognizes and follows this principle. But unless the undertakers are bound to maintain their bridges so as to be suitable for future traffic they do not give the public as good a right as they had before, for the right of the public is to continue along the highway with its ordinary means of support. Maintenance of a highway means maintenance for the ordinary traffic which it may from time to time have to bear, and a bridge carrying the highway

(1) (1815) 3 M. & S. 526.
(2) (1811) 13 East, 220.
(3) (1811) 14 East, 317.
(4) (1858) 2 H. & N. 840.
(5) (1850) 15 Q. B. 827, at p. 844.
(6) [1909] 2 K. B. 403.

remains simply as part of the highway. How then is it possible to maintain one standard for the ordinary highway and another for the bridge? The obligation to repair includes not only the bridge but the road over it: *North Staffordshire Ry. Co.* v. *Dale* (1); *Bury Corporation* v. *Lancashire and Yorkshire Ry. Co.* (2); *Attorney-General* v. *Midland Ry. Co.* (3); *Macclesfield Corporation* v. *Great Central Ry. Co.* (4) On the making of the bridge the liability of the local authority is transferred to the company and the new obligation is presumably co-extensive with the old. The contention of the respondent is supported by the Locomotive Act, 1861, s. 6, which implies that, in the view of the Legislature, a bridge carrying a highway must at least be strong enough to bear the ordinary traffic of the district. *Reg.* v. *East and West India Dock Co.* (5) was clearly a case of extraordinary traffic and it was distinguished on that ground in *Birmingham Canal Co.* v. *Hickman.* (6) A private Act which interferes with the rights of the public is to be construed strongly against the promoters: *Scottish Drainage and Improvement Co.* v. *Campbell.* (7) Assuming, therefore, that the language of s. 61 is ambiguous, that standard of repair should be adopted which is most favourable to the public, and the right of the public is to have a highway sufficient for the needs of all time.

Sir R. Finlay, K.C., replied.

[The following authorities were also referred to: *Caledonian Ry. Co.* v. *Glasgow Corporation* (8); *Attorney-General* v. *Great Northern Ry. Co.* (9); *Lord Provost of Glasgow* v. *Glasgow and South Western Ry. Co.* (10); *Rex* v. *Inhabitants of Oxfordshire* (11); *Dand* v. *Kingscote* (12); *Staffordshire and Worcestershire Canal Navigation Co.* v. *Hallen.* (13)]

The House took time for consideration.

(1) (1858) 8 E. & B. 836.
(2) (1888) 20 Q. B. D. 485; (1889) 14 App. Cas. 417.
(3) (1908-9) 25 Times L. R. 189; ibid. 547.
(4) [1911] 2 K. B. 528.
(5) 60 L. T. 232.
(6) (1891) 7 Times L. R. 646; affirmed (1892) 8 Times L. R. 407.
(7) (1889) 14 App. Cas. 139, at p. 142.
(8) [1909] A. C. 138.
(9) (1914) 83 L. J. (Ch.) 763.
(10) [1895] A. C. 376.
(11) (1825) 4 B. & C. 194.
(12) (1840) 6 M. & W. 174
(13) (1827) 6 B. & C. 317.

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1915. Feb. 19. VISCOUNT HALDANE L.C. My Lords, about the year 1812 a canal company, who were the predecessors in title of the appellants (bound by the obligation of the company), constructed certain bridges over a canal which extended from Birmingham to Worcester. These bridges formed part of works undertaken with the powers conferred by an Act 31 Geo. 3, c. 59. This Act authorized the construction of the canal itself, and provided by its 61st section that the company should, among other things, make and from time to time maintain and support such bridges, arches, culverts, drains, and passages over, under, by the side of, or into the canal as certain commissioners should determine. The section further enacted that the company should not "make the said canal . . . . across any common highway . . . . until they shall . . . . have made and perfected such bridges . . . . across such highway . . . . and of such dimensions, and in such manner, as the commissioners . . . . shall adjudge proper; and all such . . . . bridges . . . . to be made shall, from time to time, be supported, maintained, and kept in sufficient repair, by the said company."

The bridges were constructed in a fashion approved and adjudged proper by the commissioners. The question which arises in this appeal may be shortly stated. Since 1812 the ordinary traffic which might be expected to pass along the highways and cross the bridges has become materially heavier, and of this traffic there is some which the bridges will not bear unless they are reconstructed. The Court of Appeal decided that the appellants were liable to repair the bridges in such a way that they should be sufficient to bear the ordinary traffic which might, at the present time, be reasonably expected to pass along the highways carried by them over the canal—a conclusion which might obviously necessitate reconstruction. In so deciding they differed from Phillimore J., who had held that the obligation was limited to keeping the bridges in such a condition that they could bear the traffic which might have been expected to pass over them in 1812, the date when they were made. The question is, therefore, whether the statute has imposed an obligation to reconstruct the bridges from time to time so as to bear traffic which, though ordinary, is progressively including heavier vehicles.

My Lords, this question depends exclusively on s. 61, and to the language of that section I therefore turn. I do not think that the words "supported" and "maintained" add anything to the effect of the expression "kept in sufficient repair." Now it is to be observed that what are to be kept in sufficient repair mean such bridges as were approved by the commissioners. In my opinion this language, so far as the natural meaning of the words goes, prescribes unambiguously the extent of the obligation to keep in repair. It appears to me to stop short of imposing on the appellants an obligation to reconstruct so as to provide bridges of a standard higher than that which the commissioners have prescribed. When they had certified what was to be perfected and made they were prima facie functi officio.

It will be observed that they are given no powers as regards maintenance, support, or repair, their supervision being confined to the original construction. Such, to my mind, is the natural import of the section, and unless there is some principle of law which directs that the language is to be read as implying something that is not expressed, that is what the meaning ought to be taken to be. Authorities were cited at the Bar in support of the proposition that a duty such as is contended for by the respondents ought to be implied, and among these authorities we were referred to *Rex* v. *Kerrison*. (1) There undertakers were authorized by statute to make a river navigable, and to cut the soil belonging to other persons in order to make a new channel or other things necessary for making the river navigable. Substantially nothing further was said in the statute. The undertakers, in the execution of these powers, built a bridge over which they carried the highway, and for some time they repaired the bridge. Later on they contested their liability to do so. They were indicted in consequence, and the Court of King's Bench—Lord Ellenborough C.J. and Le Blanc and Bayley JJ.—held that the indictment would lie, for the words of the statute conferred on the undertakers a power to cut the highway only upon an implied condition that an adequate means of passage was substituted for the benefit of the public.

My Lords, the words of the statute interpreted there were very

(1) 3 M. & S. 526.

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different from the words we have to deal with. They prescribed nothing about liability to repair, and left the question of where the liability was to fall to be determined by implication. In the case before us this is otherwise. Sect. 61 contains a set of provisions which appear on their face to be intended as exhaustive. Under these circumstances I see no reason for departing from, or adding to, the natural meaning of the language. Authorities in cases of construction of statutes of this nature can rarely be of much value. The statutes, the language of which has to be construed, vary in expression, and, as they must be read as a whole, the materials for answering questions of interpretation ought primarily to be sought for within the four corners of the Act of Parliament, and not in what judges, however eminent, have said either about other statutes, the language of which is different, or about the common law, which is superseded by the code expressed.

My Lords, it may be that, as was said by Fletcher Moulton L.J. in *Hertfordshire County Council* v. *Great Eastern Ry. Co.* (1), where persons acting under statutory authority interrupt a highway they must, if nothing to the contrary is enacted, construct such works as will restore to the public its use, and maintain these works, unless the statute provides otherwise. But this does not touch the question in the present case, which is, there being a provision in the statute, what obligation its words impose. Nor does the other recent authority cited, *Macclesfield Corporation* v. *Great Central Ry. Co.* (2), carry the matter further. The point there turned on words in a statute which differed materially from those before us.

The Court of Appeal seem to have thought that the obligation under these words to maintain and repair might have imposed an obligation to make new works, by analogy to the general obligation of the county authority to keep a highway in such a condition that it could carry not only the traffic of the period at which it was made, but heavier traffic coming into existence subsequently. But s. 61 of the Act which we have to construe in the present case does not appear to me to admit of resort to any presumption of intention based on the analogy of the common law. It contains a code, so far complete in itself, and it is self-contained.

(1) [1909] 2 K. B. 403, at p. 412. (2) [1911] 2 K. B. 528.

I am therefore of opinion that the judgment of the Court of Appeal was wrong and ought to be reversed. The declaration to be substituted for that contained in the order complained of should not, however, be in the form adopted by Phillimore J. I think that his order should be varied by directing that the appellants are liable to support, maintain, and keep in repair each of the bridges (reserving Lowesmoor Bridge for further consideration) in the condition in which it was made and perfected, in accordance with the adjudication of the commissioners, and that the bridges, as made in 1812, ought to be presumed to have satisfied the requirements which the commissioners made. As this variation does not substantially modify the result of this appeal, the appellants (there having been no costs given at the trial) are entitled to their costs here and in the Court of Appeal.

I move accordingly.

LORD DUNEDIN. My Lords, I concur, and as to the construction of this statute have nothing to add. I wish, however, to state explicitly my opinion that the whole question necessarily depends upon the proper construction of the statute; and that where the statute deals with the subject its provisions form a code on that subject, and cannot be added to by what has been called a common law doctrine.

I am unable to agree with the dictum of Fletcher Moulton L.J. in the case of *Hertfordshire County Council* v. *Great Eastern Ry. Co.* (1), which is approved of in the judgments in the Court of Appeal in this case, and which in my opinion is too broadly expressed, as it would import a common law obligation running side by side with the expressed statutory obligations.

The dictum is founded on the four cases of *Rex* v. *Inhabitants of Kent* (2), *Rex* v. *Inhabitants of Parts of Lindsey* (3), *Rex* v. *Kerrison* (4), and *Reg.* v. *Inhabitants of Ely.* (5)

Now, *Rex* v. *Inhabitants of Kent* (2), if looked into, will be found to be based upon an obligation extracted by construction from the words of the statute. The point of the judgment is thus put

(1) [1909] 2 K. B. 403, at p. 412.
(2) 13 East, 220.
(3) 14 East, 317.
(4) 3 M. & S. 526.
(5) 15 Q. B. 827.

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by Lord Ellenborough C.J.: "Here the statute gives power to the company to take or alter the old highway for their own purposes, upon condition of leaving another passage as convenient in its room: and if they do not perform the condition, they are not entitled to do the act. It is a continuing condition." That case is, therefore, no authority for the proposition.

Rex v. *Inhabitants of Parts of Lindsey* (1) only decided that the county was *not* liable to maintain the bridge in question; but so far from imposing liability on the canal company, it expressly points out that the company may discontinue the bridge.

There remain the two cases of *Rex* v. *Kerrison* (2) and *Reg.* v. *Inhabitants of Ely* (3), and it is true that in neither of them was reliance placed on a clause of the statute enjoining anything on the parties who had made the bridge. In neither case, however, was there a specific statutory authorization to make the bridge. In *Kerrison's Case* (2) the power was merely to straighten a river and cut new channels. A new channel had intercepted a highway, and a bridge had been made and continuously repaired by the undertakers since 1695. The Court in 1815 held that they must still go on repairing it.

In *Reg.* v. *Inhabitants of Ely* (3) the bridge was originally constructed by adventurers without any Act of Parliament soon after 1630, though their undertaking was in 1663 vested by Act of Parliament in a corporation. The judgment really followed the case of *Kerrison.* (2)

My Lords, I am not doubting the authority of these two cases. But it seems to me a perfectly different thing to come to the conclusion that when, without special statutory authority, there has been made an obstruction to a public road, which obstruction has been obviated by means of a bridge, then the right of the undertaker to continue the obstruction is conditional upon his maintaining the bridge, and to raise up a so-called common law doctrine of repair where the work in question is specifically allowed by statute; and when the statute itself in a clause or clauses expresses the conditions under which the work may be done.

(1) 14 East, 317. (2) 3 M. & S. 526.
(3) 15 Q. B. 827.

Authorization by statute to do a particular thing makes that thing, when done, a legal act, and imposes no liability. This has often been held, as in a question with private individuals, e.g., in the cases as to sparks from locomotives and vibration caused by trains, and I see no reason why the principle is not equally sound in the case of a public right, and when the statute which authorizes goes on to provide what are to be the rights and obligations flowing from the execution of the statutory act, it is in it and in it alone that rights and remedies must be found.

I think the right view was taken by Wright J. in the case of *West Lancashire Rural District Council* v. *Lancashire and Yorkshire Ry. Co.*(1), where in a case which fell under the Railways Clauses Act of 1845 he treated the question as depending entirely on the true construction of the sections of that statute.

LORD ATKINSON. My Lords, in the argument of this appeal many authorities were cited to establish that it is the duty of road authorities to keep their public highways in a state fit to accommodate the ordinary traffic which passes or may be expected to pass along them. As the ordinary traffic expands or changes in character, so must the nature of the maintenance and repair of the highway alter to suit the change. No person really contests that principle.

It was further argued that where a canal or railway is cut through a highway, removing a piece of it, and those who do this are required to provide, in the shape of the roadway over a bridge, a new piece of highway as a substitute for the portion of the old so cut away, all the duties of maintenance and repair imposed by law on the road authority in reference to the old highway are imposed, at least prima facie, upon the body having authority over the substituted highway, and just as the road authority would have been bound to keep the old piece of road fit for ordinary traffic, however increased or altered in character, so must the bridge authority keep their structure fit for the increased or altered ordinary traffic.

It is not disputed that the road authority cannot widen one of the public highways.

(1) [1903] 2 K. B. 394.

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In my view little assistance can be obtained from the discussion of these general principles towards the solution of the question to be decided in this case. One must look first, and I think I might almost say look last, at the provisions of the statute under which were built the bridges in reference to which the dispute arises. Upon those provisions, which are in themselves complete, the decision must depend. The statute is the 31 Geo. 3, c. 59. Sect. 61 is the important section. It is printed at pp. 23 and 24 of the Appendix. It prescribes that the company of proprietors therein mentioned "shall . . . . make, erect, and set up, and from time to time maintain and support . . . . such bridges, arches, culverts, drains, and passages over, under, by the side of, or into the said canal, and the trenches and aqueducts communicating therewith, and the towing paths on the sides thereof, of such dimensions, and in such manner, as the said commissioners" (i.e., the commissioners named in the Act) "shall from time to time judge necessary and appoint."

The commissioners are thus made the judges of the dimensions of the bridges which they consider it necessary to construct, and the manner in which they are to be constructed. The further duty imposed upon them in this part of the section is, from time to time, to maintain and support the works—the bridges amongst them—which they shall have so made, erected, or set up. No duty is cast upon them in this part of the section to maintain any bridges other than those they have so erected. It is not to be assumed that when they "appointed" the bridges to be erected they did not do their duty, or did not to some extent contemplate an increase of the ordinary traffic; but it could not, I think, be supposed that they could have contemplated its alteration in character in the extraordinary way it has altered in recent years.

Then the section proceeds to enact that the company of proprietors shall not make the canal or any trench in or across any common, highway, public bridle-way, or footpath, unless they shall have made and perfected such bridges, passages, and arches across such highway, bridle-way, or path, and of such dimensions and in such manner as the said commissioners shall deem proper. This provision was obviously directed to secure that the public

should not be put to the inconvenience of having their common highway or public bridle-way, or footpath, intersected until the substituted way had been provided. The commissioners are again made the absolute judges of the proper dimensions and the proper manner of construction of these bridges, and then the section proceeds to deal, not merely with the bridges, passages, and arches to be built across the highway, bridle-path, or foot-ways, but in addition with the works and conveniences, including bridges, mentioned in the earlier portion of the section.

It enacts that all *such* gates, stiles, bridges, arches, and other works and conveniences to be made shall from time to time "*be supported, maintained, and kept in sufficient repair.*"

If one asks oneself the question, what, in relation to the *crossing* of the old highway where the canal is cut, are the structures which are to be supported, maintained, and kept in good condition, surely the answer must be those particular bridges, passages, and arches which were built by the company of proprietors, of the dimensions and in the manner adjudged proper by the commissioners, and not bridges, passages, and arches not built by this company at all, but built from time to time by their successors long afterwards. The identity of the work approved of by the commissioners must, I think, be preserved.

I cannot think the words "supported, maintained, and kept in sufficient repair" can be stretched to cover reconstruction in whole or in part so as to make the bridges so built and perfected something different from what they were left when finished according to the directions of the commissioners. Restoration so as to make them as near what they were when built, as time, wear, and the elements will permit, is, in my view, the very utmost that can be required from the appellants, the successors of the builders.

I concur with my noble and learned friend Lord Dunedin in his criticism of the several authorities cited in argument. I do not think, therefore, that the Attorney-General is entitled to either of the wide declarations he asked for.

I concur in the order which has been suggested by my noble and learned friend on the woolsack.

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LORD PARKER OF WADDINGTON. (1) My Lords, so far as the result of this appeal depends only on the true construction of 31 Geo. 3, c. 59, the appellants are, in my opinion, entitled to succeed. That Act defined the conditions upon which the canal company might construct the canal across a common highway. It might do so if it carried the highway over the canal by a bridge the size and strength of which was to be determined by certain commissioners appointed by the Act, and every such bridge when completed was from time to time to be supported, maintained, and kept in sufficient repair by the company. The company, under the powers of the Act, constructed the canal across certain highways, carrying the highways over the canal by means of bridges which (as must be assumed after this lapse of time) were of the size and strength determined by the commissioners. In determining such size and strength the commissioners would, of course, be bound to take into account the requirements of the ordinary traffic which might be expected to pass over the bridges, but there was nothing to prevent them from taking into account also the possible or probable increase in the dimensions and weight of the vehicles then in use, and for all that is known they may have done so. It was clearly their duty to uphold the public interests as against those of the canal company.

My Lords, since these bridges were built the traffic which may reasonably be expected to pass over the highways in question has become considerably heavier, by reason of the introduction of mechanical traction, and it is doubtful how far the bridges are of sufficient strength to bear this heavier traffic. The respondents contend that the company's obligation to maintain and support the bridges, and keep them in sufficient repair, involves an obligation to strengthen them as occasion may require, so that they will at all times be adequate to the ordinary traffic which may reasonably be expected to pass along the highways, however such traffic may increase in weight, and even though this obligation may involve pulling down and rebuilding the fabric itself. In my opinion this contention cannot be upheld. What the company has to support, maintain, and keep in repair is in

(1) Read by Lord Parmoor.

each case the fabric of the particular bridge, the size and strength of which were originally determined by the commissioners appointed by the Act, and there is, I think, no principle of construction by which an obligation to maintain, support, and repair a particular fabric can be enlarged into an obligation to reconstruct or rebuild the fabric in such a way that it is materially different in strength, size, or otherwise from the particular fabric the subject of the obligation. The standard by which the obligation is to be judged is neither the ordinary traffic when the canal was constructed nor the ordinary traffic of to-day, but the bridge itself as determined by the commissioners under the Act.

My Lords, the respondents relied on the common law principle laid down in the case of *Rex* v. *Kerrison* (1) and other cases, and recently acted upon by the Court of Appeal in *Hertfordshire County Council* v. *Great Eastern Ry. Co.* (2) This principle is stated by Fletcher Moulton L.J. in the last-mentioned case as follows: "Where persons, acting under statutory authority, for their own purposes interrupt a highway by some work which renders it impossible for the public to use it, an obligation is prima facie imposed upon them to construct such works as may be necessary to restore to the public the use of the highway so interrupted, and the obligation so imposed is of a continuing nature, involving not only the construction of such works, but also their maintenance."

It was contended that on this principle the company's obligations were not only those expressly imposed by the Act, but included a common law obligation under which it was bound from time to time to construct and maintain such bridges as would afford the public the same facilities for traffic which would have been enjoyed if the canal had never been carried across the highways in question.

For the reasons stated by the Lord Chancellor, I think this contention fails. It is one thing to rely on a common law principle where a statute is silent. It is quite another thing to invoke a common law principle in order to impose an obligation different from or in addition to the obligations which

(1) 3 M. & S. 526. (2) [1909] 2 K. B. 403.

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are defined by the statute as those subject to which a company may interfere with a highway.

In my opinion, therefore, the appeal should be allowed, and I am content with the order proposed by the Lord Chancellor.

LORD PARMOOR. My Lords, the appellants are successors of the Company of Proprietors of the Worcester and Birmingham Canal Navigation, who, under the provisions of the Act 31 Geo. 3, c. 59, constructed certain canal bridges and other works now vested in the appellants. They are subject to the same obligations and liabilities as those imposed upon the said company of proprietors.

The question raised is as to the standard of liability in supporting and maintaining in sufficient repair certain canal bridges constructed to make communication between the severed portions of certain highways within the city of Worcester.

The Court of Appeal have determined that the appellants are liable to support, maintain, and keep in repair the said bridges (reserving Lowesmoor Bridge) sufficient to bear the ordinary traffic of the district which might reasonably be expected to pass along the highway carried over the appellants' canal.

It was argued on the appeal to this House that the appellants are only bound to support, maintain, and keep under sufficient repair the bridges constructed by their predecessors with the sanction and approval of the commissioners appointed under the said Act, and that they are not bound to support or reconstruct such bridges so as to enable them to carry an increased weight of traffic, though such traffic might from time to time, as conditions change, be reasonably expected to pass along the highway.

The question is simply one of the construction of s. 61 of the said Act. This section deals with three different subject-matters: (1.) that the towing path shall be fenced off; (2.) that certain accommodation works shall be constructed; (3.) that the said company of proprietors shall not make the canal or any trench in or across any public highway until they shall have made and perfected such bridges across such highway, and of such dimensions, and in such manner, as the said commissioners

shall adjudge proper, and that such bridges shall from time to time be supported, maintained, and kept in sufficient repair by the said company of proprietors.

It is admitted, for the purpose of the case, that the bridges in question were originally made in accordance with the provisions of the said Act, and were approved and adjudged proper by the commissioners. What is the standard of liability placed upon the appellants to support, maintain, and keep these bridges in sufficient repair? I can find no difficulty in the language of the section, giving to the words their ordinary meaning. It appears to be quite clear that the standard of support, maintenance, or repair is fixed not in relation to the changing conditions of traffic, but to the character and strength of the structure as ordered and approved by the commissioners. It is a fixed standard, not a mutable one varying with the requirements of the traffic from time to time. In his argument on behalf of the respondents, Mr. Cave relied on three points: First, that the word "supported" implied more than the word "maintained," and placed an obligation upon the defendants to reconstruct a bridge not sufficiently strong to carry traffic which might reasonably be expected from time to time to pass along the highway on either side of any one of the bridges. Secondly, that the word "sufficient" implied sufficiency for such traffic. Thirdly, that in Acts of this character, which legalize the severance of a public highway, there is a presumption that the liability to support, maintain, and repair the substituted means of communication is the same as attaches to the road authority in respect of the severed portions of the highway.

As to points (1.) and (2.), I am unable to hold that an obligation to support and keep in sufficient repair a particular bridge can be construed as an obligation to reconstruct the bridge on a different scale, or of a different strength and character. The main argument on which reliance was placed is that the appellants are, by presumption or implication, under the same obligation as the road authority, although no such obligation is expressly imposed. The obligation of a road authority is to keep the roads, as dedicated to the public, in a reasonably fit state to bear the ordinary traffic of the district which may reasonably be

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expected to come upon them: *Chichester Corporation* v. *Foster* (1); *Burgess* v. *Northwich Local Board.* (2) *Hertfordshire County Council* v. *Great Eastern Ry. Co.* (3) is the case on which the respondents mainly rely. This case contains a sufficient reference to the earlier authorities. In my opinion it gives no support to the contention raised on behalf of the respondents. It not inaptly illustrates the difference between making a presumption where the statute is silent, and making a presumption where the nature and extent of the obligation are expressly defined in the terms of the statute. It was held that where there is a duty on a railway company to make some means of communication for the purpose of restoring the continuity of a severed highway, there is also involved a duty to keep in repair the substituted work, although there are no express words imposing the obligation in the statute.

Lord Moulton in his judgment expresses the opinion that to get rid of this presumption the company which has been authorized to sever a highway must show that the statute, which legalized the severance, contains some provisions amounting to an exemption from such an obligation, and that it is not enough that the statute is silent on the point. In the present case the statute is not silent either as to the nature of the substituted works or as to the obligation of the appellants to keep them in repair. The nature and strength of the substituted works are determined by the commissioners, and the obligation is to support and maintain in sufficient repair such works.

To make a presumption such as was made in the *Hertfordshire Case* (3) would be setting aside the statutory obligation and substituting a different one in its place. The substituted obligation would not only be different from that imposed by the statute, but under certain conditions inconsistent with it. It is not unreasonable to suppose that the commissioners directed bridges to be constructed with a margin of strength beyond what was necessary for the traffic which might at that date have been reasonably expected to pass over the severed highways, and so long as this margin was not exhausted the appellants would have

(1) [1906] 1 K. B. 167. (2) (1880) 6 Q. B. D. 264.
(3) [1909] 2 K. B. 403.

been liable to fulfil their obligations of maintenance and repair, though the traffic was of an exceptional character and in excess of what might reasonably have been expected at the time. It may be true that in more recent times the balance has turned the other way, but this is no reason for rescinding the clear words of a statute. If in the public interest a different standard of liability from that imposed by 31 Geo. 3, c. 59, has become more convenient, it is a question for Parliament whether such different standard should be imposed, and at whose cost the necessary reconstruction should be carried out. The function of the Courts is simply to construe a statute so as to give effect to the will of the Legislature, and in the present case the language used is free from any ambiguity.

My Lords, in my opinion the appeal should be allowed with costs, and the order varied in the form approved by the Lord Chancellor.

Order of the Court of Appeal reversed and judgment of Phillimore J. restored, with the following variation:—That, for the declaration in the judgment of the learned judge, there be substituted a declaration that the appellants are liable to support, maintain, and keep in repair, each of the bridges (reserving Lowesmoor Bridge for further consideration) in the condition in which it was made and perfected in accordance with the adjudication of the commissioners, and that the bridges as made in 1812 *ought to be presumed to have satisfied the requirements which the commissioners made. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House.*

Lords' Journals, February 19, 1915.

Solicitors for appellants: *Burton, Yeates & Hart, for Johnson & Co., Birmingham.*

Solicitors for respondent: *Church, Rendell, Bird & Co.*

[HOUSE OF LORDS.]

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CORPORATION OF THE CITY OF LONDON Appellants;

AND

ASSOCIATED NEWSPAPERS, LIMITED AND OTHERS . . . . . Respondents.

Rates—Exemption—City of London—Land reclaimed from Thames—"Free from all taxes and assessments whatsoever"—Poor Rate—County Rate—Education Expenses—Equalization Charge—7 Geo. 3, c. 37, s. 51—County Rates Act, 1852 (15 & 16 Vict. c. 81), ss. 2, 21, 26—Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 77, Fifth Schedule.

The Valuation (Metropolis) Act, 1867, Sched. V., which repeals so much of ss. 1 to 20 of the County Rates Act, 1852, as relates to the preparation of a basis or standard of county rate, deals with procedure only and does not affect the incidence of the county rate.

By s. 51 of 7 Geo. 3, c. 37, it was provided that certain lands reclaimed from the river Thames should vest in the adjoining owners "free from all taxes and assessments whatsoever."

The education expenses for London under the Education Act, 1902, read with the Education (London) Act, 1903, the equalization charge under the London (Equalisation of Rates) Act, 1894, and the sums required to be raised by the London County Council for general county purposes under s. 68 of the Local Government Act, 1888, are payable by means of county contributions which are levied by means of county rates made under the County Rates Act, 1852, upon the basis of the annual value of the "hereditaments rateable to the relief of the poor" in every parish, and by s. 26 of that Act, as modified by the Local Government Act, 1888, precepts for the levy of money required to be raised by a county rate are directed by county councils to the guardians of the poor, who raise the money so required in like manner as the money required by the guardians for the relief of the poor, i.e., by contribution orders addressed to the overseers of the parishes, who pay the money out of the poor rates collected by them.

In pursuance of these Acts, read with the City of London (Union of Parishes) Act, 1907, precepts were addressed by the London County Council to the Common Council of the City of London, who were the overseers of the parish of the City of London, within which the reclaimed lands were situated, for the payment of the sums required to be levied in the parish for the above mentioned purposes. The Common Council paid such sums out of the poor rate levied by them in the parish and they assessed the reclaimed hereditaments to so much of the poor rate

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* *Present:* Earl Loreburn, Lord Atkinson, Lord Parker of Waddington, Lord Sumner, and Lord Parmoor.

as comprised the sums required to meet the precepts of the London County Council:—

Held, that the exemption, which included the poor rate (*Rex* v. *London Gas Light and Coke Co.* (1828) 8 B. & C. 54), covered the charges in question; by Earl Loreburn and Lord Atkinson, on the ground that the reclaimed hereditaments were not "rateable to the relief of the poor" within the meaning of the County Rates Act, 1852; by Lord Sumner, on the ground that the poor rate was one and indivisible; by Lord Parker of Waddington and Lord Parmoor, on both grounds.

Decision of the Court of Appeal [1914] 2 K. B. 603 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of a Divisional Court (2) upon a special case stated by the Quarter Sessions for the City of London pursuant to s. 11 of the Quarter Sessions Act, 1849.

The respondents, as owners and occupiers of certain premises situated in the parish of the city of London and built upon land reclaimed from the Thames under the powers of 7 Geo. 3, c. 37, were assessed by the appellants, as overseers of the parish of the city of London, to such part of a poor rate made by them on April 6, 1911, as was required to meet certain contributions levied by the London County Council upon the said parish.

Upon an appeal by the respondents to the quarter sessions against this assessment, by consent of the parties and by an order of Lush J., a special case was stated for the opinion of the King's Bench Division.

The facts stated by the special case, so far as material, were as follows:—

4. Under the powers granted by the 7 Geo. 3, c. 37, part of the ground and soil now forming the reclaimed area was inclosed and embanked by and at the expense of the Mayor, Aldermen, and Commons of the City of London in Common Council assembled and the remainder of such ground and soil was inclosed and embanked by and at the expense of the owners and proprietors of the several wharfs or grounds abutting on the north side of the river Thames within the limits specified in the Act.

5. The whole of the ground and soil so inclosed and embanked and now forming the reclaimed area was by s. 51 of that statute vested in the owner or owners, proprietor or

(1) [1914] 2 K. B. 603. (2) [1913] 2 K. B. 281.

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proprietors of the then existing wharfs or grounds adjoining thereto according to their respective interests "free from all taxes and assessments whatsoever."

7. By the City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 5, the reclaimed area became (together with other areas) a part of the parish of the city of London which was formed by that Act. By virtue of s. 11 of that Act the appellants (the respondents in the special case) were the overseers of the parish of the city of London.

8. The powers of the overseers of the parish of the city of London to levy a poor rate were derived from 43 Eliz. c. 2 and subsequent statutes.

9. By virtue of the Education Act, 1902 (2 Edw. 7, c. 42), read with the Education (London) Act, 1903 (3 Edw. 7, c. 24), the London County Council were the local education authority for London. By s. 18 of the Education Act, 1902, it was provided that the expenses under that Act of the council of a county should (so far as not otherwise provided for) be defrayed out of the county fund.

10. By the London (Equalisation of Rates) Act, 1894 (57 & 58 Vict. c. 53), s. 5 (*b*), it was provided that where the contribution due from a parish under that Act exceeded the grant due to the parish the London County Council should for the purpose of meeting the excess levy on the parish a county contribution (called the equalization charge) as a separate item of the county rate.

11. By virtue of the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 68, the London County Council levied county contributions in order to meet any deficiency caused by the moneys standing to the general county account being insufficient to meet the expenditure for general county purposes, and in order to meet any deficiency caused by the moneys standing to any special county account being insufficient to meet the expenditure for any of the special county purposes chargeable to that account. Where any moneys required by the London County Council for either of the purposes specified in paragraphs 9 or 10 of the special case or for any other purposes for which the London County Council were by law entitled to levy money out

of rates were in law leviable such moneys were levied by means of such county contributions aforesaid.

12. Such county contributions were levied by the county councils by means of county rates made according to the provisions of the County Rates Act, 1852 (15 & 16 Vict. c. 81). By s. 26 of the last-mentioned Act read together with s. 3, sub-s. 1, of the Local Government Act, 1888, precepts for the levy of the money required to be raised by a county rate were directed by county councils to guardians of the poor who raised the money required by such precepts to be paid in like manner as the money required by such guardians for the relief of the poor. By ss. 40 and 41 of the Local Government Act, 1888, the county of London was created out of parts of the counties of Middlesex, Surrey, and Kent as a separate county, and that county together with the county of the city of London (which was left to continue as a separate county) was made an administrative county for the purposes of that Act by the name of the Administrative County of London. By the same two sections the provisions of the Act of 1888 were adapted to the special circumstances of the three last-mentioned counties.

13. By virtue of the Poor Law Board's General Order dated April 22, 1842, and made under the powers of the Poor Law Amendment Act (4 & 5 Will. 4, c. 76), s. 15, and by virtue of the Poor Law Board's Consolidated Order Amendment Order dated February 26, 1866, made under the powers of the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 11, the money required by guardians for the relief of the poor was raised by contribution orders addressed to the overseers of parishes who were to pay such money out of the poor rates collected by them. The City of London Union was a poor law union for the purposes of the Poor Law Acts and consisted of one parish only, namely, the parish of the city of London created by the aforementioned Act of 1907. There was still a board of guardians for the City of London Union. A scheme had been duly made under s. 5, sub-s. 4, of the Act of 1907.

14. By s. 12 of the City of London (Union of Parishes) Act, 1907, "every precept issued by any authority for the purpose of obtaining money which is ultimately to be raised out of a rate

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within the parish of the city of London . . . . shall be sent to the Common Council . . . . 'Precept' in this section includes any order certificate warrant or other document of a like character."

15. By virtue of the enactments and orders above specified or some of them (all of which were to be read with and deemed to be part of the case) precepts or contribution orders were addressed by the London County Council to the appellants for the payment of any sums required by the London County Council—as the authority for the administrative county of London—to be levied in the parish of the city of London for any of the purposes specified in paragraphs 9, 10, and 11, or other purposes authorized by law.

The appellants in their turn paid any sums so required to be paid out of the proceeds of the poor rate levied by them on the parish of the city of London.

16. The Corporation of London levied a distinct county rate for the city of London for the purpose of raising moneys to meet expenditure which could by law be met out of a county rate. This county rate was levied in accordance with the provisions of the County Rates Act, 1852.

17. The poor rate made the 6th day of April, 1911, was made at the rate of 2*s.* 6*d.* in the pound and included the sums of money required to meet the precepts of the London County Council as hereinbefore described.

In this rate of 2*s.* 6*d.* in the pound, the following amounts in the pound were included for the purposes aforesaid, namely :—

	d.	
Education	$11\frac{2}{16}$	in the £
Other purposes of the London County Council	$7\frac{12}{16}$	„ „ „
Equalization charge	3	„ „ „
	s. d.	
Total to meet London County Council's precepts	1 $9\frac{14}{16}$	„ „ „

The hereditaments in question were assessed only to such part of the poor rate as was required to raise the sums needed to meet the precepts of the London County Council, that is to say, at the rate in the pound of 1*s.* $9\frac{14}{16}$*d.* only.

Paragraph 18, after referring to *Sion College* v. *London Corporation* (1), stated that at the time of the passing of the statute 7 Geo. 3, c. 37, there was no rate, tax, or assessment for the purposes of education, and that after the passing of the Elementary Education Act, 1870, and before the passing of the Education (London) Act, 1903, the expenses for elementary education raised in the city of London were paid out of the consolidated rate.

19. The respondents (the appellants in the special case) contended—

(1.) That by virtue of the statute 7 Geo. 3, c. 37, they were not rateable to the poor rate or any portion thereof in respect of any hereditament owned or occupied by any of the appellants within the reclaimed area.

(2.) That being by virtue of that statute as owners or occupiers of the several hereditaments free from all taxes and assessments whatsoever, they were not liable to pay the poor rate or any portion thereof.

(3.) That by virtue of that statute they were as such owners or occupiers not rateable to a rate made for the relief of the poor of the parish of the city of London and for other purposes chargeable thereon according to law and that the exemption from such a rate conferred upon them as such owners or occupiers by the statute was not affected or prevented from applying to such a rate by any subsequent enactment.

(4.) That by virtue of that statute they were as such owners or occupiers not liable to be assessed to such portion of the poor rate appealed against as was made for the purpose of raising any sums required by the London County Council, such sums being only leviable by means of the poor rate.

20. The appellants (the respondents in the special case) contended—

(1.) That the statute 7 Geo. 3, c. 37, only exempted the properties in question from rates and assessments made under enactments then in force and not since repealed and did not extend to rates made under later enactments.

(2.) That moneys raised for the purpose of education were

(1) [1900] 2 Q. B. 581; [1901] 1 K. B. 617.

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imposed by legislation subsequent to that statute and that the exemption conferred by the statute did not apply thereto.

(3.) That the occupiers of lands within the reclaimed area were not exempted by 7 Geo. 3, c. 37, from contributing to any of the purposes included in the rate for which the London County Council's precepts were or could be issued.

(4.) That the Local Government Act, 1888, had created a wholly new entity, namely, the administrative county of London, with a new governing body and new rating powers and new functions.

(5.) That the hereditaments within the reclaimed area were not exempt from the poor rate as now leviable in the parish of the city of London.

The question for the opinion of the Court was whether the respondents (the appellants in the special case) were liable to pay the sums assessed upon them in respect of the poor rate or any of them as owners or occupiers of hereditaments situate within the reclaimed area.

The Divisional Court (Channell, Bray, and Lord Coleridge JJ.) confirmed the rate.

The Court of Appeal (Vaughan Williams, Kennedy, and Swinfen Eady L.JJ.) reversed the order of the Divisional Court and held that the respondents were exempted by 7 Geo. 3, c. 37, from liability to be assessed to the poor rate or any part of it.

1915. Jan. 28, 29. *Cave*, *K.C.*, and *Ryde*, *K.C.* (with them *Boydell Houghton*), for the appellants. The exemption conferred by s. 51 of 7 Geo. 3, c. 37, is limited to charges in existence at the time of the passing of the statute, 1767, and subsequent charges representing charges then in existence. The section has been consistently interpreted in this sense for over 100 years. In *Williams* v. *Pritchard* (1) the exemption was held applicable to the general land tax imposed by 27 Geo. 3, c. 5, but only because that tax was a continuation of the previously existing charge. In *Eddington* v. *Borman* (2) it was held applicable on the same principle to rates made under 11 Geo. 3, c. 29. *Perchard* v. *Heywood* (3) was a decision against the exemption in the case of the window

(1) (1790) 4 T. R. 2. (2) (1790) 4 T. R. 4.
(3) (1800) 8 T. R. 468.

tax and the decision was based on the grounds (1.) that it was a new tax and (2.) that it was not a local tax. *Rex* v. *London Gas Light and Coke Co.* (1) was a decision in favour of the exemption in the case of the poor rate. The particular rate was imposed by a later Act, but the ground of the decision was that it was a continuation of the old poor rate, and Bayley J. described the exemption as analogous to a covenant to pay taxes, which applied to old taxes or others substituted for them, but not to taxes entirely new, in the absence of words of futurity: *Hopwood* v. *Barefoot.* (2) In *Sion College* v. *London Corporation* (3) the exemption was held not to apply to a consolidated rate made under the City of London Sewers Act, 1848; by the Divisional Court on the ground that the later Act impliedly repealed the exemption, and by the Court of Appeal on the ground that the exemption applied only to existing rates. *London Corporation* v. *Netherlands Steamboat Co.* (4) was a decision upon a different statute and is not inconsistent with the *Sion College Case* (3), which has been recently followed by the Divisional Court in *Associated Newspapers* v. *City of London Corporation* (No. 2). (5) As regards the origin of the exemption, all the reclaimed land being below high water mark was extra-parochial—*Reg.* v. *Musson* (6); *Bridgwater Trustees* v *Bootle-cum-Linacre* (7); *McCannon* v. *Sinclair* (8); *Waterloo Bridge Co.* v. *Cull* (9) —and the insertion of the exemption clause was attributable to this cause rather than to the theory of a bonus for undertaking the work of reclamation. But by the Poor Law Amendment Act, 1868, s. 27, all extra-parochial places are brought into particular parishes. This reclaimed land therefore became part of the parish from the date of the passing of that Act and is no longer exempt.

The charges now in question are for the purposes of education and of equalization of rates and for other purposes of the London

(1) 8 B. & C. 54.
(2) (1709) 11 Mod. 237.
(3) [1900] 2 Q. B. 581; [1901] 1 K. B. 617.
(4) [1906] A. C. 263.
(5) [1914] 2 K. B. 822; since affirmed [1915] W. N. 218.
(6) (1858) 8 E. & B. 900.
(7) (1866) L. R. 2 Q. B. 4.
(8) (1859) 2 E. & E. 53; 28 L. J. (M.C.) 247.
(9) (1858) 28 L. J. (Q.B.) 70.

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County Council. All those purposes are new purposes and the charges, though levied on the poor rate, are new charges. The modern poor rate is not a rate for the relief of the poor, as it was in 1767, but is a rate for a combination of purposes, and "poor rate" has come to be nothing but a label. The respondents cannot therefore claim exemption from the rate as a whole, but the rate must be severed according to its purposes. There is no law that the poor rate must be treated as one and indivisible: *Islington Corporation* v. *London School Board.* (1) The charges in question in this case are levied by means of county rates made under the County Rates Act, 1852, and by s. 3 a basis or standard for such rates is to be prepared according to the annual value of the "hereditaments rateable to the relief of the poor" in the parish. It was urged in the Courts below that these hereditaments were not rateable to the relief of the poor by reason of the exemption, but this argument is disposed of by the Divisional Court, who held that "hereditaments rateable to the relief of the poor" in this connection meant hereditaments which in the ordinary course were capable of being rated to the relief of the poor or of the character of those which were rateable to the relief of the poor. Further, so much of ss. 1 to 20 of the County Rates Act, 1852, as relates to the preparation of a basis or standard of county rate is repealed by the Valuation (Metropolis) Act, 1869, and the valuation list for the time being in force is to be conclusive for the purposes of the county rate. But the valuation list should include property which is subject to this exemption: *Rex* v. *City of London Assessment Committee.* (2) The education charge was formerly levied on the consolidated rate made under the City of London Sewers Act, 1848, which abolished the exemption, and the transfer of the charge to the county rate, which is a mere matter of machinery, does not recreate the exemption. [They also referred to *Mansfield* v. *Relf.* (3)]

Sir R. Finlay, K.C., and *Macmorran, K.C.* (with them *Konstam*), for the respondents. 1. The exemption in the Act of 1767 applies to all taxes and assessments present or future unless the exemption

(1) [1902] 2 K. B. 701; [1903] 2 K. B. 354.

(2) [1907] 2 K. B. 764.

(3) [1908] 1 K. B. 71.

is either expressly or impliedly taken away by an Act imposing fresh taxation. The Act of 1767 is to be regarded as a bargain between the Corporation and the landowners. As the result of that bargain the land in question came into existence and the exemption from taxation was the inducement to procure the work of reclamation. Why should not the words receive their natural construction? There is no ground for reading into the exemption the words "so long as the land continues extra-parochial," and if the land was extra-parochial the exemption would not be wanted. Further, the authorities cited by the appellants do not establish that this land was extra-parochial. It is said that the established practice of 150 years ought not to be disturbed, but the practice is the other way. Except for one attempt in 1906 which miscarried, no attempt has been made to charge these rates until 1911, when the present proceedings were taken.

[EARL LOREBURN. But there has been a judicial interpretation of this statute 120 years ago and we should not disturb that except in case of necessity.]

In *Perchard* v. *Heywood* (1) it was held that this property was not exempt from the window tax, but the charging Act contained an express abolition of all exemptions; it was therefore not necessary to deal with the construction of the Act of 1767. Further, the ground of Lord Kenyon's decision does not assist the appellants. He differentiates between an imperial tax and a local rate, and his view was that the former could not have been part of the bargain between the parties because the Corporation could by contract only affect something over which they had some power. He nowhere decides that the Act of 1767 was confined to old rates. In *Williams* v. *Pritchard* (2) and in *Eddington* v. *Borman* (3) the exemption was held to apply, and in the latter case the facts state that the land was situate in the parish of St. Anne, Blackfriars, thus disposing of the extra-parochial point. In *Rex* v. *London Gas Light and Coke Co.* (4) the exemption was held applicable to the poor rate. The dictum of Bayley J. on which the appellants rely was not necessary to the decision of the case. These authorities show that the exemption applies to all charges

(1) 8 T. R. 468.
(2) 4 T. R. 2.
(3) 4 T. R. 4.
(4) 8 B. & C. 54.

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collected separately in the locality and applied to local purposes, and it may be that in deference to Lord Kenyon's opinion the exemption should be so restricted. But they contain no decision that the exemption is limited to then existing or substituted charges. *Sion College* v. *London Corporation* (1) was decided by the Divisional Court and by the Court of Appeal on two totally distinct grounds and its authority is impaired by the observations of Lord Davey in *London Corporation* v. *Netherlands Steamboat Co.* (2)

2. The taxing Acts by which the charges in question are imposed do not take away the exemption. As regards the effect of the consolidated rate made under the City of London Sewers Act, 1848, Lord Davey was of opinion that the language of s. 169 of that Act was not sufficiently explicit to repeal by implication an express statutory exemption in an earlier Act, and that question is now pending before the Court of Appeal (3); but, further, the question does not arise, for the education charge has been transferred by the London Education Act of 1903 to the county rate, and therefore to the persons liable to pay that rate, and stands on the same footing as the other charges to which this action relates. The county rate is made under the County Rates Act, 1852, which provides for the making of the rate upon the basis and standard of the annual value of the hereditaments rateable to the relief of the poor. "Rateable" in this connection must bear its natural meaning, which is "liable to be rated," and if premises are exempted from the poor rate they are not liable to be so rated and are not rateable. The fact that the premises are not at the time occupied will not prevent them from being rateable, although the rate for the time being cannot be enforced, but that is a different matter. "Property rateable to the relief of the poor" means premises on which a rate may be assessed, which rate the occupier is liable to pay, and the money required under this Act is to be raised from the same persons in respect of the same property as would be liable to a rate for the relief of the poor. The qualified repeal of ss. 1 to 20 of the Act of 1852 by the Valuation (Metropolis) Act, 1869, relates only to the preparation

(1) [1900] 2 Q. B. 581; [1901] 1 K. B. 617. (2) [1906] A. C. 263.
(3) Since decided [1915] W. N. 218.

of the basis and standard, but the basis and standard remain. It deals merely with machinery and has nothing to do with the properties affected or the persons liable. That is made doubly clear by s. 54, which preserves all exemptions. That Act therefore has no bearing on the question.

3. The poor rate is one and indivisible and there is no power to dissect it according to the objects for which the rate is demanded: *Ash* v. *Nicholl* (1); *Farmer* v. *London and North Western Ry. Co.* (2) *Islington Corporation* v. *London School Board* (3) is distinguishable because there there were two rates to be levied as one, but the general rate was not made part of the poor rate. The county rate is not a rate made by a rating authority on ratepayers, but the London County Council send precepts to the guardians who in turn send precepts to the overseers of the several parishes, and the money is demanded by the overseers as poor rate. The only power of the overseers is to levy a poor rate, and the county rate is paid out of the poor rate.

Cave, K.C., replied.

The House took time for consideration.

Feb. 25. EARL LOREBURN. My Lords, the city of London merely discharged a public duty in bringing this case before the Courts, and though I think the appeal must fail, I also think that had Parliament foreseen the effect of the Acts we have to consider it would probably have taken steps to secure that the rates now in question should be payable by the respondents as the City desires.

The question is whether these respondents ought to pay certain rates in respect of hereditaments built upon land reclaimed some 150 years ago from the river Thames.

I look first at the Act under which they are said to be charged. It is the County Rates Act, 1852, which provides that justices shall prepare a basis or standard for fair and equal county rates according to the full and fair annual value of the lands, tenements,

(1) [1905] 1 K. B. 139. (2) (1888) 20 Q. B. D. 788, at p. 792.
(3) [1902] 2 K. B. 701; [1903] 2 K. B. 354.

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and hereditaments rateable to the relief of the poor in every parish (s. 2). Justices are then to make a fair and equal rate according to this basis or standard, and according thereto are to assess and tax every parish (s. 21), and are then to issue precepts to the guardians stating the sum charged on each parish, and "such guardians shall raise the monies required by such precepts to be paid in like manner as the money required by such guardians for the relief of the poor" (s. 26).

If this Act remains undisturbed, then it is clear that no one is charged with this rate except in respect of hereditaments which are rateable to the relief of the poor. There is particular machinery for preparing the basis, but the rate cannot be charged except as I have said. And if the hereditaments concerned in this case are not "rateable to the relief of the poor," then neither the respondents nor any one else can be charged in respect of them under the Act.

In the argument at your Lordships' Bar two points of importance were advanced on behalf of the City. In the first place it was contended that the Act of 1852 has been in part repealed, so that these rates are now payable in respect of hereditaments like those now in question, whether they are rateable to the relief of the poor or not. In the second place it was argued that these hereditaments were in fact so rateable according to the true meaning of the words in the Act. I will deal with each of these arguments.

In regard to the first contention, it is true that in 1869 (by 32 & 33 Vict. c. 67) the Act of 1852 was in part repealed: "So much of sections one to twenty both inclusive as relates to the preparation of a basis or standard of county rate for any part of the metropolis, and sections forty to forty-three both inclusive" are repealed. This repeal alters the method of valuing but does not make any change as to the subjects which are to be rated. So the subjects in respect of which the rate is to be paid are still only those which are rateable to the relief of the poor.

In regard to the second contention, I think hereditaments rateable to the relief of the poor are those upon which by law a poor rate can be imposed. The alternative view, propounded by Mr. Cave and Mr. Ryde, is that the Act bids us inquire whether

the hereditaments are by their character such as in the ordinary course would bear a poor rate. That would be rather a vague direction. I think the Act merely says whatever is liable to a poor rate for the relief of the poor is to bear this rate.

Now, it is clear that the hereditaments now in question cannot be rated for the relief of the poor, because by an old Act of 1767 they are made "free from all taxes and assessments whatsoever." A good deal of learning was expended in discussing the meaning of this exemption. But I will not inquire further, because if the exemption of 1767 means anything at all it must at least mean that these hereditaments are free from rates for the relief of the poor which were old rates in 1767. So the second contention fails.

Holding this view, I need not consider whether a rate which is now called a poor rate, but consists of a variety of charges unconnected with the relief of the poor, is one and indivisible, so that you cannot analyse its ingredients.

Upon the whole matter I think the order appealed from ought to be sustained, and I rest my opinion upon the ground that the Act imposing these rates does not impose them upon these particular hereditaments, they not being "rateable to the relief of the poor."

LORD ATKINSON. My Lords, I concur. I need not restate the facts.

It cannot, in my view, be disputed that the services in respect of which this sum of 1*s.* $9\frac{14}{16}$*d.* in the pound is charged are new services; that they did not exist in 1767, and were never contemplated by the framers of the Act then passed; that the public services, such as education, the cost of which these rates purport to be levied to defray, are in no way connected with the relief of the poor within the meaning of 43 Eliz. c. 2. Neither can it be disputed, I think, that the respondents are, as your Lordships were informed, but one of a class of persons who take the full benefit of the several services for which they decline to pay, preferring apparently that the costs of those services should fall upon their neighbours. Indeed, it was pointed out on their behalf, as a merit possibly, that this must

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be so, inasmuch as the sum required to be raised within the area of taxation must be raised, however few of the occupiers of hereditaments within it pay the rate. The respondents are, no doubt, entitled to insist upon placing this burden upon their neighbours, if the unscientific and somewhat blundering legislation upon which they base their right clearly secures to them the immunity they claim, but, in my view at least, the extension of the immunity from "all taxes and assessments" granted by the Act of 1767 until it covers the cost of all these modern public services is wholly inconsistent with every principle of justice in the distribution of municipal burdens. I quite concur with my noble and learned friend on the woolsack in thinking that had Parliament foreseen the effect of the Acts which have to be considered in this case, it would, probably, have taken steps to secure that the rates now in question should be payable by persons in the position of the respondents. Indeed, I would be inclined myself to go somewhat further, and to say that it is almost inconceivable that Parliament should not have done so if it had paid due regard to the apparent origin and the natural and just extent of the exemption.

In paragraph 5 of the respondents' case the several statutes under which rates were levied in the year 1767, when 7 Geo. 3, c. 37, was passed, are conveniently set out with sufficient fulness. They deal with relief of the poor, with hospitals and almshouses, provision for prisoners and vagabonds, houses of correction and the building of gaols, and lastly with the building and maintenance of bridges. In fact, none of the moneys raised under any of these different statutes was, in the city of London, applied to the erection or maintenance of bridges, funds for these needs being provided from other sources.

It is only necessary to read through these several statutes to see that the purposes with which they deal, other than those last mentioned, are much more akin to the objects aimed at by 43 Eliz. c. 2 for the relief of the poor than are those of the Education Act or Equalisation of Rates Act. Yet it is claimed on behalf of the respondents, as I understood, that under the words of the 51st section of 7 Geo. 3, c. 37, "free from all taxes and assessments whatsoever," they are to be

exempted from the payment of assessed rates for whatever modern purposes imposed or collected, and in addition from "all taxes." If taken literally these words are, indeed, wide enough to cover even such imposts as income tax under Sched. A. I do not know whether the respondents claim exemption from that tax.

An effort was made by Mr. Ryde, on behalf of the appellants, to account for the exemption from rates of the land enclosed under this statute of George III. He contended that parishes abutting on a tidal river were bounded by high water mark, and that the subaqueous bed and soil of such rivers was extra-parochial. Whether that be so or not, it is clear that the enclosed land was in after times treated as intra-parochial, though how it became so does not appear. I think this contention, therefore, fails. One thing, however, is plain: the statute does not show that the persons in whose favour the statutory exemption was granted ever performed any public or municipal service to deserve it. The right by which they seem to have acquired the enclosed land was that they were owners of the lands and wharves abutting upon the river. For all that appears it may be that they anticipated the modern practice, too often resorted to, and by opposing the passing of the Act of George III. extorted this concession from the fears of the promoters. It is all left obscure, however, and one is left to guess at the reason for such a wide-reaching and extraordinary exemption.

The whole project was but a comparatively trifling affair. The estimated cost of the work was only 7500*l.* The land, if embanked by the Common Council of the City of London, was to be liable to an annual quit rent of 1*d.* per superficial foot, and if embanked by the adjoining proprietors to an annual quit rent of $\frac{1}{4}d.$ per superficial foot, so that $\frac{3}{4}d.$ per superficial foot was the money value fixed by the statute of the enterprise of the riparian proprietors in this regard. The 12th Geo. 2, c. 29, empowered the justices to make one rate, styled in the marginal note to s. 3 of the Act the "county rate," to defray the cost of all the services already mentioned. This rate was to be collected by the high constables of the hundreds or divisions in which the towns, parishes, and other places assessable were situated. The

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churchwardens and overseers of the poor were, on the demand of the high constable, bound to pay the amount of these county rates to him out of the moneys collected by them for the relief of the poor. In parishes or townships where there was no rate for the relief of the poor the petty constables or other peace officer might be directed to levy this county rate in such manner as money required for the relief of the poor was by law to be levied, and to pay over the same to the high constables.

Now, this was practically the state of things when the statute of 1767 was passed. And, presumably, regard must have been had to it by the Legislature which passed the Act. The appellants are quite willing that the respondents should be exempted from the payment of all rates raised, levied, or made payable for the purposes of any of the public or municipal services above mentioned, or any modern services which are their true or real equivalents. That, however, is not enough for the respondents. They contend, as I understand them, that as they are, by this statute, exempted from the payment of poor rate, they are exempted from the payment of the cost of every modern service, however unthought of in 1767, and however fully they may take the benefit of it, if it should happen that that cost is charged upon or made payable out of the poor rate. This poor rate they insist is one and indivisible, and as they are by the 7th Geo. 3, c. 37, relieved from paying it, they cannot be required to pay any part of it.

It is not difficult, in my view, to form a decided opinion on the merits of such a claim. Its legality is a different matter. But for the provision of the County Rates Act of 1852 and the somewhat timid and halting provision of the Valuation (Metropolis) Act of 1869, it might have been necessary to decide on this appeal the question of the divisibility of the poor rate, but as things are it is not, and I, therefore, express no definite opinion upon the point. The County Rates Act, 1852 (15 & 16 Vict. c. 81), is a consolidating Act. By its 2nd section it is provided that the justices at sessions shall appoint a committee for the purpose of preparing a standard for fair and equal county rates. This basis or standard is to be founded and prepared rateably and equally according to the full and fair annual value of the property,

messuages, lands, tenements, and hereditaments rateable to the relief of the poor in any parish, township, borough or place, &c. Rateability to the relief of the poor is in this section, apparently, treated as if it were some quality of the messuages or other subjects enumerated. Strictly speaking there are no such things in England as rateable hereditaments in that sense.

The 43rd Eliz. c. 2 imposes the rate for the relief of the poor on the occupier of a hereditament by reason of his occupation of it, if beneficial, not by reason of any estate or proprietary interest he may have in it. This was decided so long ago as the 9th Car. 1, the year 1633; and again and again in your Lordships' House for nearly half a century, in cases reaching from *Mersey Docks* v. *Cameron* (1), decided in 1865, to *Liverpool Corporation* v. *Chorley Union Assessment Committee.* (2) It has been often pointed out and decided that no rate can be levied in respect of the most stately mansion in London if it be left vacant and unoccupied, nor in respect of the most fertile plot of land if the occupier be debarred by law, and not merely by an act of his own volition, from deriving any benefit from it. See *Hare* v. *Putney Overseers* (3), approved of in *Lambeth Overseers* v. *London County Council.* (4) The draftsman of this statute was apparently so attached to this misleading and inaccurate use of language that he repeats it in the 21st section, and I think the phrase has now become somewhat common. By this latter section the justices are empowered, whenever circumstances require, to direct a fair and equal county rate to be made "for all the purposes to which the county stock or rate is now or shall hereafter be made liable by law, according to the basis or standard for the time being in force in such county or division." The section then goes on to provide that the justices are to assess and tax every parish, township, and other place, &c., "rateably and equally . . . . upon the basis or standard hereinbefore mentioned of the full and fair annual value of the property, messuages, lands, tenements, and hereditaments rateable to the relief of the poor therein," &c. This confused section merely means, I think, that the justices are to levy the county rate according to the basis

(1) (1865) 11 H. L. C. 443.
(2) [1913] A. C. 197.
(3) (1881) 7 Q. B. D. 223.
(4) [1897] A. C. 625.

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already prepared on the persons who, in respect of the occupation of the premises therein mentioned, would be liable to be rated for the relief of the poor.

The basis already prepared is, I think, the foundation upon which the machinery of this section rests, and to which the powers it confers apply. The statute, however, does not stop there. By the 26th section it is further provided that the justices are to send precepts to the guardians of the union in which any parish is situate, stating the sum assessed on that parish for the county rate, and it then enacts that the guardians shall raise the money required by the precept to be paid "in like manner as the money required by such guardians for the relief of the poor," and, further, that they shall pay such moneys at the time limited and in the manner prescribed by the precept.

The Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), contains elaborate provision for the preparation of valuation lists showing, amongst other things, the gross value of premises, that is, the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for them if the tenant paid all rates and taxes, the landlord paying the cost of repairs and all other expenses, and showing also the "rateable value," that is, the gross value after deducting the probable annual average cost of repairs, insurance, and of other expense above mentioned. By its 45th section it is provided that this list while in force should, for the numerous purposes thereafter mentioned, be conclusive as to the gross and "rateable value" of the hereditaments mentioned in it. Amongst those purposes are those of the county rate, the poor rate, sewers, consolidated, and other rates in the city of London. It may possibly have been the intention of the Legislature that the owners or occupiers of all the hereditaments mentioned in this list should be rated in respect of them to the county rate according to this rateable value. If so, the Legislature has failed to express its meaning. Indeed, when it comes to deal with the repeal of the provision of the County Rates Act of 1852 it only provides that so much of ss. 1 to 20, both inclusive, as relates to the preparation of the basis or standard of the county rate for any part of the metropolis, and ss. 40 to 43 inclusive, are repealed. Thus

ss. 21 and 26 of the Act of 1852, which purport to impose the rate, are left intact, while the basis or standard upon which the rate was to be imposed can no longer be prepared in the manner prescribed.

The case turns upon these unrepealed provisions of the Act of 1852. The respondents contend that they are not liable to be assessed for the purpose of these statutes of 1894 or 1902 and 1903, inasmuch as they are not, on the true construction of the above-mentioned sections of the Act of 1852, liable to be assessed to the county rate, since by the statute of 1767 they are exempted from payment of the poor rate. It is a well-established principle to be followed in the construction of the statute that if the words of a statute be ambiguous and susceptible of two meanings, one of which leads to absurd, unjust, or mischievous results and the other does not lead to any results of that character, the latter construction should be preferred, since it is not to be presumed that the Legislature meant to bring about results of this kind; but that if the words of the statute are plain and clear, then effect must be given to them irrespective of what results may follow. See *Vacher & Sons* v. *London Society of Compositors.* (1) I think the words of ss. 21 and 26 of the Act of 1852 imposing the county rate on those liable to pay the poor rate are sufficiently plain and clear to come within that principle, and guided by it, I am, accordingly, of opinion that the contention of the respondents must prevail and this appeal be dismissed with costs. I wish at the same time to say that I think the appellants were fully justified in instituting this litigation and persisting in it to the end.

LORD PARKER OF WADDINGTON. (2) My Lords, the question for decision in this case is whether the respondents, as occupiers of certain hereditaments situate in the city of London, are liable to pay so much of the rate levied under the Act 43 Eliz. c. 2 as is attributable to precepts for raising money issued by the London County Council (1.) for educational purposes under the Education (London) Act, 1903, and (2.) for the purpose of the London Equalisation of Rates Act, 1894.

(1) [1913] A. C. 107. (2) Read by Lord Parmoor.

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By virtue of the Education (London) Act, 1903, the London County Council is the educational authority for London, and its expenses as such are by virtue of that Act, and of s. 18 of the Education Act, 1902, to be defrayed out of the county fund. Deficiencies in this fund are met by contributions levied by means of a county rate made under the provisions of the County Rates Act, 1852. Similarly moneys required for the purposes of the London Equalisation of Rates Act, 1894, are, according to that Act, to be collected by contributions as a separate item of the county rate made under the provisions of the County Rates Act, 1852. Whether, therefore, the hereditaments in question are under any such liability as is suggested must depend primarily on the provisions of the last-mentioned Act.

The 2nd section of the County Rates Act, 1852, provides for the preparation of a basis or standard for fair and equal county rates, such basis or standard to be founded and prepared according to the full and fair annual value of the property rateable to the relief of the poor in every parish or place, whether parochial or extra-parochial. The 21st section of the Act provides that the county authority, then the justices of the peace assembled in quarter sessions, but now the county council, may, whenever circumstances appear to require it, order and direct a fair and equal county rate to be made for all the purposes to which the county stock or rate may be liable by law, according to the basis or standard for the time being in force, and for that purpose may assess and tax every parish or other place, whether parochial or extra-parochial, within the limits there defined, rateably and equally according to a certain pound rate upon the basis or standard aforesaid, according to the full and fair annual value of the property rateable to the relief of the poor therein, or which in any place not maintaining its poor would be so rateable if the last-mentioned place were a parish, any law or statute to the contrary thereof notwithstanding.

The 26th section of the Act provides that the county authority may order precepts to be issued to the poor law guardians having jurisdiction in any parish assessed, stating the sum assessed on such parish, and requiring the guardians to cause the aggregate of sums assessed on parishes within their

jurisdiction to be paid by them out of the moneys held by them on behalf of each such parish, to be paid as therein mentioned, and such guardians are to raise the moneys required by such precepts to be paid in like manner as the money required by such guardians for the relief of the poor.

It is to be observed that the Act contains no express provision as to the hereditaments ultimately liable to contribute to the county rate. Sects. 2 and 21 refer, it is true, to property rateable to the relief of the poor, but only in connection with the preparation of a standard or basis or the assessment of contributions on the several parishes or places liable. The hereditaments ultimately liable can only be ascertained by considering the effect of the direction that the guardians are to raise the sums mentioned in the precepts in the same manner as moneys required by them for the relief of the poor. In order to obtain the money required for relief of the poor the guardians in their turn, under the provisions of the Poor Law Acts or Orders made thereunder, issue precepts to the overseers of the several parishes in which they have jurisdiction, and finally the overseers obtain the moneys they have to pay to the guardians by levying a rate under 43 Eliz. c. 2. It necessarily follows that the hereditaments ultimately liable to contribute to the county rate are those in respect of which a rate can be levied under 43 Eliz. c. 2.

It was suggested that the words, "rateable to the relief of the poor," in ss. 2 and 21, might be construed to mean not actually rateable but of such a nature that, ignoring all special circumstances or statutory provisions to the contrary, they would be rateable. In my opinion this suggestion cannot be accepted. The obvious and natural meaning of the expression, "property rateable to the relief of the poor," is property for the time being liable to be rated under the statute of Elizabeth. Further, even if the suggestion were accepted, it would only affect the standard or basis, and the amount of the contributions assessed on the various parishes. The guardians would still have to raise the moneys required by precepts to the overseers, and the overseers could only levy the rate on hereditaments which were for the time being liable to be assessed to poor rate.

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It was also suggested in argument that the provisions of the Valuation (Metropolis) Act, 1869, which repeals so much of ss. 1 to 20, both inclusive, of the County Rates Act, 1852, as relates to the preparation of a basis or standard of county rate for any part of the metropolis, and provides that in construing this Act the basis or standard shall be deemed to be the rateable value stated in the valuation list therein referred to, rendered all hereditaments in the valuation list liable to county rate, even though under the County Rates Act, 1852, they were not so liable. I think, however, it is reasonably clear that the Valuation (Metropolis) Act, 1869, was intended to affect machinery rather than to alter rights or the incidence of the county rate. The 54th section preserving existing exemptions confirms this view.

Whether, therefore, the respondents are liable to pay the county rate must depend upon whether they are liable to be assessed to poor rate in respect of the hereditaments in question. It is admitted that these hereditaments were reclaimed from the bed of the river Thames under the powers conferred by the Act 7 Geo. 3, c. 37, the 51st section whereof provides that all lands so reclaimed shall vest in the owners of the adjoining property according to his, her, or their respective interests therein, free from all taxes and assessments whatever.

The meaning of this provision has been the subject of a number of judicial decisions, but it has hitherto generally been admitted that the words are sufficient on any reasonable construction to exempt the reclaimed lands from poor rate. If so, it follows that they are equally exempt from the county rate, including that part of the county rate which is required for educational purposes or equalization of rates.

In order to get rid of this conclusion, counsel for the appellants put forward the following argument. The bed of the Thames, he said, was extra-parochial, and therefore not liable to the poor rate. The effect of s. 51 was merely to continue this freedom from liability so long as the reclaimed land remained extra-parochial. It has long ceased to be extra-parochial, and therefore the privilege continued by the Act has long since ceased.

It would, I think, be doing extreme violence to the language

used to construe the section in this way. If the desire of the Legislature were in fact to continue an exemption from rates due to the property being extra-parochial, which is pure surmise, it is more reasonable to suppose from the words used that the continuation of exemption was meant to be perpetual. Had it been intended to be for a limited period, the period would no doubt have been specified.

My Lords, I have arrived at this result upon a consideration of the true construction of the County Rates Act, 1852. I desire to say, however, that the same result may, in my opinion, be equally arrived at for the reasons so clearly stated by Swinfen Eady L.J. in the Court of Appeal. The 51st section of the Act of 7 Geo. 3, c. 37, must, I think, exempt the property from the rate levied under 43 Eliz. c. 2, and this is in reality the only rate from which the respondents are now claiming exemption. It is true that the moneys now leviable by means of such rate are applied for a variety of statutory purposes, but the rate remains the same. If authority is required for this proposition, it may be found in the cases of *Farmer* v. *London and North Western Ry. Co.* (1) and *Ash* v. *Nicholl.* (2) The case of *Islington Corporation* v. *London School Board* (3) turned upon the special provisions contained in s. 10 of the London Government Act, 1899, with regard to the general rate.

With regard to the case of *Sion College* v. *London Corporation* (4), I need only say that it, too, turned on certain special statutory provisions, those, namely, contained in s. 169 of the City of London Sewers Act, 1848, and has no application to the county rate, but only to the consolidated rate leviable under the last-mentioned Act.

It is true that if this case is good law, as to which I reserve my opinion, the respondents were, in respect of the hereditaments in question, liable to contribute to the expenses of the school board of the metropolis, and that the effect of making educational expenses a charge on the county fund instead of on the consolidated rate is to relieve them of contribution to any

(1) 20 Q. B. D. 788.
(2) [1905] 1 K. B. 139.
(3) [1902] 2 K. B. 701; [1903] 2 K. B. 354.
(4) [1901] 1 K. B. 617.

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education expenses, but it does not appear to me that this is any reason for construing either the County Rates Act, 1852, or the Act 7 Geo. 3, c. 37, otherwise than according to its natural meaning. In matters of this sort it may often happen that the Legislature fails to foresee some particular result of a statutory enactment.

In my opinion the appeal should be dismissed with costs.

LORD SUMNER. My Lords, I concur. Logically the first question would be the appellants' power to charge, but the shortest course is to examine first the respondents' statutory exemption.

Sect. 51 of the Act of 1767 does not make freedom from assessment depend on the continued extra-parochiality of the area. No later statute limits or repeals this freedom from assessment, at any rate so far as poor rate is concerned. The Sewers Act of 1848 does not touch exemptions from poor rate. The exemption therefore stands.

The section is to be read as if it named poor rate and declared this area (the land, be it observed, not the owners of it) to be free from it. If so, the appellants fail unless they can maintain the apportionment of the poor rate itself, to which they resorted when demanding payment from occupiers in this area. The rate made on April 6, 1911, of 2*s.* 6*d.* in the pound not only was called but was a poor rate; it not only appeared to be but really was one undivided rate. Those who made it were the statutory successors to the overseers of the parish, and in the absence of any statutory definition of poor rate, of which there appears to have been none till long after 1767, I think that poor rate connotes quite as much an impost levied on occupiers by overseers as an impost spent for the purpose of relieving the poor. I do not think it is open to the appellants to contend on this appeal that the rate, taken as a whole, had so changed its character as no longer to be the poor rate known to and impliedly named by the Legislature in 1767. As part of it—rather over 8*d.* in fact—clearly was for poor relief proper, it certainly has not lost all substantial identity with the eighteenth century rate for the relief of the poor. Further, by making no demand upon the respondents for this

portion, I think the appellants are now debarred from contending that the entire rate, as made, was a new one unknown to the Act of 1767. How they may stand on another occasion I do not know. They are therefore reduced to the claim of a right to sever and apportion the rate of 2*s.* 6*d.*, for no poor rate at the rate of 1*s.* 9$\frac{7}{8}$*d.* has been made at all.

My Lords, apart from cases in which it is admitted that two or more existing rates have merely been joined together for purposes of collection, as if they were, what they nevertheless are not, one single rate, I cannot see how this contention can be supported. I think the Court of Appeal rightly held that it could not. The rate that is made, demanded, and levied is one thing; the purpose for which it is made and to which it is applied is another. The exemption is not limited to such sums as are levied for the relief of the poor only, for in 1767 the existing poor rate was already levied for other purposes than those of poor relief exclusively, and it was an impost which had grown by various Acts of Parliament beyond its original character. What proportion of the rate then levied was for other purposes than poor relief does not appear and does not matter. The statutes which authorized the rate of 2*s.* 6*d.* in question, and the statute of 1767 which grants the exemption, deal in this regard with the same subject-matter, and the exemption operates to free the respondents from any demand in respect of the rate in question as a whole.

The consequences of the contrary view would be grave. If the purposes of the expenditure are to be regarded, so that the whole money raised is to be split up into undivided but notional parts, some of which can be demanded and others cannot, who is to decide the true character of those purposes and the amount of the fund or the proportion of the rate properly to be allocated to them? Must the exempted ratepayer be bound by the decision of the rating authority, or can he raise the question whether this or that object properly comes within the term "relief of the poor"? Can he contend that this or that outlay, though lawfully made, does not really relieve or benefit the poor, however popularly it may be supposed to do so? Can he raise all these matters in a series of questions of fact to be fought out at quarter

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sessions? If he can, the result is disastrous, and the observations made in *Ash* v. *Nicholl* (1) apply. If he cannot, what statute makes the rating authority the judge not only of the amount of the rate and the object of the expenditure, but also of the area and limits of the exemption of 1767?

The case of *Islington Corporation* v. *London School Board* (2), which was much relied on to the contrary, in my opinion is not in point. There the rate, the identity of which was held to be recognizable, so that it could be severed from the general rate of which it formed part, was not abolished by the enactments in question or merged in another rate, but was only collected with that other rate as one rate, and by the same machinery. In other words, it was not a case of analysing one rate into its elements by taking account of the several purposes for which it was raised, but of distinguishing one rate from another, though they remained, what they always were, separate imposts, and only for convenience were called by a common name and collected as if they were one.

My Lords, I think the decision on these points determines the appeal in the respondents' favour, and as I understand there is more litigation about this area in prospect or on the way, I am anxious not to say anything in this case that, without being necessary to its decision, might seem to affect any other case. I therefore express no opinion either on the respondents' contention that the exemption of 1767 applies alike to totally new impositions and to entirely old ones, or on the contention that the statutory provisions under which county rate is chargeable are not so expressed as to make them liable in any event.

LORD PARMOOR. My Lords, this appeal raises the question whether the respondents, as occupiers of certain premises reclaimed from the Thames under 7 Geo. 3, c. 37, are liable to pay rates required to be levied by the appellants, as overseers, to meet a precept issued by the county council to raise money for certain county purposes. These purposes are shown upon the demand note to include general county purposes of the London County Council and the equalisation charge under the

(1) [1905] 1 K. B. 139. (2) [1902] 2 K. B. 701; [1903] 2 K. B. 354.

London Equalisation of Rates Act, 1894. The general county purposes include the education rate. It is sufficient to say that when the reclaiming Act was passed in 1767, the expenditure, to meet which the London County Council have issued their precept, was not being incurred, and that the purposes, for which the rates objected to are required, are new since that date.

The main point for decision is whether the County Rates Act, 1852, has imposed upon the respondents any liability to pay the rates in question, having regard to an exemption contained in s. 51 of 7 Geo. 3, c. 37. By this section the reclaimed lands are vested in the owner or owners, proprietor or proprietors, of adjoining frontages, "free from all taxes and assessments whatsoever."

It was decided in *Rex* v. *London Gas Light and Coke Co.* (1) that s. 51 of the Act of 7 Geo. 3 exempted the occupiers of the reclaimed land from poor rate. This decision has not been questioned, and is recognized in the demand note attached to the special case. This note demands under the head of poor rate 1*s.* 9⅞*d.* in the pound, whereas if the respondents were liable to the full poor rate the demand would be at the rate of 2*s.* 6*d.* in the pound. This being the nature of the exemption so far as is material to the decision of the present case, the question arises whether the Act of 1852 imposes the charge upon the respondents.

The County Rates Act of 1852 makes provision: (1.) For the preparation of the basis or standard for county rates. (2.) For assessing and taxing every parish, township, borough, or other place, whether parochial or extra-parochial, according to a pound rate upon such basis or standard. (3.) For imposing the charge upon the individual ratepayer. In the present case the important matter is the charge on the individual ratepayer, but when the Act of 1852 is examined it will be found that the ratepayer to be charged occupies premises assessed under the basis or standard, and taken into account in fixing the quota of each district liable to contribute.

Reference was made in the argument to the Valuation (Metropolis) Act, 1869. I do not find that this Act is referred to in the special case, in the case of the appellants, or in any of the judgments, either in the Divisional Court or in the Court of

(1) 8 B. & C. 54.

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Appeal, but in my opinion it has no relevance whatever to the matters to be decided. No doubt this Act provides a special machinery for the preparation of the basis or standard of the county rate within the metropolis, but it is an Act which deals with procedure, imposing no new rates and creating no new liability to existing rates. In addition, s. 54 provides that nothing contained in that Act, or the Acts incorporated, shall affect any exemption or deduction from, or allowance out of, any rate or tax whatever, or any privilege of, or provision for, being rated or taxed on any exceptional principle of valuation.

Sect. 2 of the County Rates Act, 1852, enacts that the basis or standard is to be founded and prepared according to the full and fair annual value of the property, messuages, lands, tenements, and hereditaments rateable to the relief of the poor, or which in any place not maintaining its own poor would be liable to be rated for the relief of the poor if such place were a parish. Applying to words their ordinary meaning, I should construe "rateable to the relief of the poor" to mean liable to be rated for the relief of the poor, and that there was no obligation upon a county authority to include in the basis or standard any property which was not liable to be so rated.

Two further considerations arise. There is no difference in principle between fixing the basis or standard within limits which maintain or do not maintain their own poor, but as to these latter limits the section uses the phrase "liable to be rated." Secondly, in my opinion, expressed later, no person not liable to pay poor rate can be charged with a county rate, and there is no reason why a basis or standard should be assessed on premises in respect of which the occupier is not liable. Sect. 21 of the Act of 1852, which empowers the county authority to assess and tax any parish, township, and other place, whether parochial or extra-parochial, within the county limits, upon the basis or standard fixed under s. 2, contains the words "rateable to the relief of the poor," or "liable to be rated for the relief of the poor." It is clear that these words must have the same meaning in s. 21 as in s. 2, and it is unnecessary to repeat the argument.

The charging section, which makes an occupier liable to a rate

levied to raise moneys to meet a county precept, is s. 26. The county precept is issued to the guardians stating the sum or sums assessed or charged on each district, and requiring the guardians to cause the aggregate of such several sums to be paid within a definite time. Then come the words which impose the charge on the individual ratepayer: "Such guardians shall raise the moneys required by such precepts to be paid in like manner as the money required by such guardians for the relief of the poor."

The only way in which guardians can raise money required for the relief of the poor is through the overseers, and in this respect there has been no alteration since the statute of Elizabeth.

The poor rate is still made by the overseers under this Act, and it is as overseers that the appellants claim to levy the rate in dispute from the respondents. Sect. 4 of the Valuation (Metropolis) Act, 1869, defines the term "overseers" to include "any person or body of persons performing the duties of overseers so far as regards the assessment, making, and collection of rates for the relief of the poor." How can the overseers levy a poor rate from the occupier of premises not subject to be assessable to the poor rate? If they cannot do so, there is no charge imposed on the respondents to pay the disputed rates under the Act of 1852, and it is not suggested in the special case that the rate is imposed by any other Act. The case of the appellants is fairly expressed in their fifth contention in the special case: "That the said hereditaments within the said reclaimed area are not exempt from the poor rate as now leviable in the parish of the city of London." In my opinion this contention is not maintainable and there is no power to impose a poor rate now leviable in the city of London upon the respondents as occupiers of premises exempted from poor rate under the Act of 7 Geo. 3.

My Lords, I have arrived at the same conclusion as the Court of Appeal, on rather different grounds, but I desire to express my concurrence in the principle on which the judgment of Swinfen Eady L.J. is founded, that the poor rate is one indivisible rate, and that the respondents cannot properly be charged with a fractional part of that rate. The case of *Sion*

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College v. *London Corporation* (1) is clearly distinguishable from the present. It was held there that the consolidated rate was a substantially new tax or assessment not within the exemption section of 7 Geo. 3. The poor rate dates from the time of Elizabeth, and was an existing tax or assessment in 1767. It makes no difference that since that date the poor rate has been applied to new expenditure or new purposes. The exemption is from taxes or assessments, and these words include the poor rate as a whole, without reference to the purposes on which the moneys raised may be expended.

I do not think that cases decided on other Acts have much bearing on the construction of the Acts or sections on which the present case depends. So far, however, as it is allowable to be guided by decisions in analogous cases I agree with Swinfen Eady L.J. that *Farmer* v. *London and North Western Ry. Co.* (2) supports the judgment of the Court of Appeal, and that the case of *Islington Corporation* v. *London School Board* (3) has no application.

My Lords, in my opinion the appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, February 25, 1915.

Solicitor for appellants: *Sir Homewood Crawford, City Solicitor.*

Solicitors for respondents: *Rollit, Sons, Hill & Compston, for W. E. Hart, Sheffield.*

(1) [1901] 1 K. B. 617.
(2) 20 Q. B. D. 788.
(3) [1902] 2 K. B. 701; [1903] 2 K. B. 354.

[HOUSE OF LORDS.]

LENNARD'S CARRYING COMPANY, LIMITED Appellants; AND ASIATIC PETROLEUM COMPANY, LIMITED Respondents.

H. L. (E.)*
1915
March 8.

Ship—Loss of Cargo by Fire—Fire caused by Unseaworthiness—"Actual fault or privity" of Owners—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 502.

By s. 502 of the Merchant Shipping Act, 1894, the owner of a British sea-going ship shall not be liable to make good to any extent whatever "any loss or damage happening without his actual fault or privity" where any goods or merchandise taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

A cargo of benzine on board ship was lost by a fire caused by the unseaworthiness of the ship in respect of the defective condition of her boilers. The shipowners were a limited company and the managing owners were another limited company. The managing director of the latter company was the registered managing owner and took the active part in the management of the ship on behalf of the owners. He knew or had the means of knowing of the defective condition of the boilers, but he gave no special instructions to the captain or the chief engineer regarding their supervision and took no steps to prevent the ship putting to sea with her boilers in an unseaworthy condition :—

Held, that the owners had failed to discharge the onus which lay upon them of proving that the loss happened without their actual fault or privity.

Decision of the Court of Appeal [1914] 1 K. B. 419 affirmed.

Appeal from an order of the Court of Appeal affirming a judgment of Bray J. (1)

The appellants were the owners of the steamship *Edward Dawson*. By a charterparty dated February 23, 1911, the ship was let on time charter to the Anglo-Saxon Petroleum Company for nine, twelve, or fifteen months at the option of the charterers. Under this charterparty she loaded a cargo of 2011 tons of benzine at Novorossisk in Russia for carriage to Rotterdam. The respondents were purchasers of this cargo and

* *Present:* Viscount Haldane L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, and Lord Parmoor.

(1) [1914] 1 K. B. 419.

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indorsees of the bills of lading. On October 1, 1911, whilst in the course of her voyage from Novorossisk to Rotterdam the ship and her cargo were destroyed by fire. The respondents brought an action against the appellants for damages for loss of the cargo.

By their points of claim the respondents alleged the failure to deliver the cargo. Alternatively they alleged that the ship was unseaworthy at Novorossisk by reason of the defective condition of her boilers and that owing to this unseaworthiness the ship with her cargo was driven ashore and lost.

The appellants by their points of defence admitted the failure to deliver, but relied on s. 502 of the Merchant Shipping Act, 1894 (1), as relieving them from liability, and they denied the allegation of unseaworthiness. The respondents by their points of reply denied that the cargo was lost by fire within the meaning of s. 502 and alleged that it was lost by perils of the sea occasioned by the unseaworthiness. Alternatively they alleged that if the cargo was lost by fire the fire was occasioned by the unseaworthiness. In the further alternative they alleged that by the terms of the contract of carriage the appellants had precluded themselves from relying on the protection of the section; but in the circumstances it became unnecessary for the Court to determine this question.

The *Edward Dawson* was a steel screw oil tank steamer. She had two boilers and each boiler had three furnaces. Her average speed was about seven knots. She was built in 1890 for a French firm and was classed in the first division of the Bureau Veritas. She was supplied with new boilers in 1896. In 1897 she was purchased by the appellants, who then expended 6500*l.* upon her. The managers of the appellant company were another company, John M. Lennard & Sons, Limited, and the managing director of that company was John M. Lennard, who

(1) Merchant Shipping Act, 1894, s. 502: "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,—

"(i.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; . . . .'

was the registered managing owner of the ship. Lennard did not give evidence at the trial.

In February, 1911, the ship was repaired at Liverpool to the requirements of the Bureau Veritas surveyor, Mr. Viehoff; and her class was extended for twelve months to March 31, 1912, but subject to the pressure of her boilers being reduced from 160 lbs. to 130 lbs. She then proceeded under the time charter to various ports in the Mediterranean and returned to Thames Haven in June, 1911. There had been trouble with her boilers during this voyage. Before the arrival of the ship at Thames Haven the charterers sent a letter to the appellants complaining that there was something greatly wrong with her engines and boilers and urging that they should be put in thorough working order, and in July, 1911, the appellants ordered new boilers and stipulated that they should be ready by the middle of November. On her arrival at Thames Haven the boilers were examined by a foreman boilermaker named Clarke, representing the general marine superintendent of the ship, Mr. Smaling. Clarke reported that the repairs necessary were of a miscellaneous but not very serious character. No instructions were given by Lennard or the appellants either to Smaling or to Clarke, nor was the charterers' complaint communicated to them. The repairs were done by Fletcher & Sons, Limited, a responsible firm, under the directions of Clarke and were limited to repairing existing leaks. The evidence showed that the normal life of a boiler if well cared for was from sixteen to eighteen years and the normal life of a set of tubes about ten years. The ship then proceeded to New York, and from New York to Barcelona and from Barcelona to Novorossisk, and during all this time the trouble with the boilers continued and increased. The master made no communications on this matter either to the appellants or to Lennard. On her arrival at Novorossisk there was a very large accumulation of salt in the boilers owing to leakage, and the crew spent two days cutting out the salt. After loading her cargo of benzine the ship left Novorossisk for Rotterdam, and before she reached the English Channel the two centre furnaces were completely salted up so that they had become useless, and two tubes in the boilers had burst. Shortly after passing Dover on September 30, 1911, the ship

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encountered a strong north-westerly gale with a heavy sea. At 3.30 P.M. the captain brought her head to the wind as he considered it dangerous to approach the Dutch coast. At 11 P.M. a tube in the port boiler burst. The fires of that boiler had to be drawn to allow the tube to be plugged, and the ship was rapidly driven to leeward. About 2 A.M. the fires were relighted, and about 3 A.M. the full pressure of steam which the two boilers and four furnaces could raise was obtained, but the ship still continued to be driven to leeward owing to the want of sufficient steam power to face the gale. At 5.30 A.M. she grounded on the Botkill Bank, and after bumping on the bank several times she got off, but about 7.40 A.M. she finally grounded in the Scheldt near Flushing. The stranding of the ship injured the tanks to such an extent that some of the benzine escaped, and the vapour of the escaping benzine coming into contact with the combustion chambers of the boilers caused an explosion which resulted in the loss of the ship and cargo.

Bray J. found that the vessel on leaving Novorossisk was unseaworthy by reason of the condition of her boilers, that the fire and consequent loss of the cargo were caused by the unseaworthiness, and that the loss did not happen without the actual fault or privity of the owners. He accordingly gave judgment for the respondents for an amount to be ascertained, which amount was subsequently ascertained at 13,500*l*. In the Court of Appeal the appellants did not contest the finding of Bray J. as to unseaworthiness, but contended that neither the unseaworthiness nor the stranding caused the fire, and that the fire and loss of the cargo occurred without the actual fault or privity of the appellants.

The Court of Appeal by a majority (Buckley and Hamilton L.JJ., Vaughan Williams L.J. dissenting) affirmed the decision of the learned judge.

1915. Feb. 26; March 1, 8. *Adair Roche, K.C.*, and *Raeburn* (with them *I. H. Stranger*, for *J. A. H. Wood*, serving with His Majesty's Forces), for the appellants. The main defence to the action is s. 502 of the Merchant Shipping Act, 1894. Unseaworthiness in respect of the boilers is admitted, but there is

nothing to connect the loss of the cargo with that unseaworthiness. The loss occurred without the actual fault or privity of the appellants. The manager Lennard was not aware of the unseaworthy condition of the boilers, nor had he the means of knowledge. He was entitled to rely on the certificate of the Bureau Veritas and upon the subsequent repairs, which were not found by Bray J. to be insufficient. But assuming that Lennard was to blame, the manager's fault or privity is not the fault or privity of the owner. It must be actual or personal fault or privity: *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (1); *Ingram & Royle* v. *Services Maritimes du Tréport* (2); *The Fanny* (3); *The Warkworth.* (4)

[LORD ATKINSON referred to *Wilson* v. *Dickson.* (5)]

In the case of a company the persons responsible would be the board of directors. There is a distinction between the board, who have the general management and control of the company, and a person appointed by the board or by the company at general meeting to do a particular class of acts: *Smitton* v. *Orient Steam Navigation Co.* (6) Lennard had the supreme control of the technical management of the ship, but he was nothing more than an agent of the appellant company. He was not the alter ego of the company. He did not represent the company in the sense of making his fault the fault of the company. The case of a company is analogous to the old case of a sixty-fourth owned ship. Sleeping ownership is recognized by law and is in the interest of public policy, and s. 502, which is a reproduction of similar provisions in older Acts, expressly exempts a sleeping owner from responsibility. The object of the section is to restrict the doctrine of respondeat superior within certain defined limits.

Maurice Hill, K.C., and *F. D. MacKinnon, K.C.*, for the respondents, were not called on.

VISCOUNT HALDANE L.C. My Lords, in this case the appellants have, at all events, the satisfaction of knowing that their case has been excellently argued by both the learned counsel who have appeared for them at your Lordships' Bar.

(1) [1912] 1 K. B. 229.
(2) [1913] 1 K. B. 538, at p. 544.
(3) (1912) 28 Times L. R. 217.
(4) (1883) 9 P. D. 20.
(5) (1818) 2 B. & Ald. 2.
(6) (1907) 12 Com. Cas. 270.

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The case, which we have now heard fully and as to which we do not think it necessary to trouble the respondents' counsel, is shortly this. The *Edward Dawson* was a tank steamer designed for the carriage of oil in bulk. She was chartered by her owners, the appellants, on a time charter to a company known as the Anglo-Saxon Petroleum Company, and in the course of her employment she proceeded to Novorossisk in the Black Sea. There she loaded in bulk 2011 tons of benzine, and the bills of lading, six in number, were indorsed by the Anglo-Saxon Petroleum Company to the Asiatic Petroleum Company, who are the respondents in this case. My Lords, the benzine has been lost, and the respondents have brought an action against the appellants to recover damages for the loss of their cargo.

Now the story of the case is in outline this: The *Edward Dawson* was built in 1890, as I have said, for the carriage of oil in bulk, and in 1907 she was bought by the appellants, who spent a good deal of money upon her, and proceeded to use her for certain voyages. In January, 1911, after she had been for a good while at sea, she was overhauled at Birkenhead, and the Bureau Veritas, a well-known agency which issues certificates and keeps a list for the purpose of showing the condition of ships, gave a certificate through Mr. Viehoff, who was their agent at Birkenhead, to the effect that she would have a satisfactory character for another twelve months, but only on condition that her boiler pressure was reduced from 160 to 130 lbs. My Lords, that obviously made a great deal of difference to the energy developing limits of capacity of the ship. Subsequently to that she proceeded on what has been described in the course of the argument as a round voyage. She went to Thames Haven, and at Thames Haven certain repairs were done under the superintendence of a Mr. Clarke to her boilers; she proceeded to New York, and from New York to Barcelona, and after various intermediate voyages she came to Novorossisk in the Black Sea, where she loaded the cargo of benzine of which I have spoken. She left Novorossisk, and the unsatisfactory condition of her boilers soon became manifest. These boilers leaked; they leaked salt water into the central furnaces, the furnaces became silted up with salt, so that their capacity was diminished, and the result

was that when the ship on her way back passed the Straits of Dover and came into the North Sea she was not in a condition to develop such power as was desirable in the event of her encountering heavy head weather. My Lords, she found herself on October 1 off the Dutch coast near the mouth of the Scheldt. There was a gale blowing, and she hove to and set her head against that gale to prevent herself from being driven on to the lee shore, but she was driven. She first of all grounded on the Botkill Bank, and then she grounded again in the mouth of the Scheldt. Her port of destination was Rotterdam, but she was by this time a good way away from Rotterdam at the mouth of another river which lies south of the Maas, on which Rotterdam is situated, namely, the Scheldt, and in the Scheldt, as I have observed, she took the ground again. She does not appear to have been under adequate control. She had, among other things, burst a tube, which was not unlikely, having regard to wear and tear in excess of the length of life of tubes, which was given in the evidence as only ten years, and to the general condition of her boilers. She burst a tube, she took the ground, she was unable to get off the ground, she bumped, and as the result of bumping the benzine got loose from the tanks, the deck bulged, the tanks were probably cracked, anyhow the benzine began to get into the furnaces, and the result was a conflagration. It was suggested that if the flame had been extinguished by the injection of water, this might have been prevented, but I do not think the evidence upon that point at all satisfactorily established that that could have been secured, or, at any rate, that the operation could have been properly carried out.

My Lords, in that state of things the loss of the cargo took place, and the case came before Bray J., who tried it, and Bray J. found a number of facts. He found these facts after hearing the evidence on both sides, and I think that his findings of fact were justified. They were these: The first was that the ship when she left Novorossisk was unseaworthy by reason of defects in her boilers. The second finding of fact was that the stranding on the Botkill Bank, just off the mouth of the Scheldt, was caused by the want of steam, which in its turn was caused by the unseaworthy condition of the boilers; and he found the same causes as

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regards the subsequent stranding in the Scheldt itself. Then in the third place he found that the loss was not caused by any negligence or want of precautions on the part of the engineers, because he does not find it proved that anything they could have done could have altered the consequences. He found that the loss of the cargo was caused by the unseaworthiness of the ship due to the condition of the boilers. Then there are other findings which are findings of mixed fact and law. One of these is that the duty of supervision remained with the managing owners, and that the fault of the managing owners was a fault that affected the company itself.

My Lords, that last question gives rise to the real question of law which occurs in this case. Taking the facts to be as the learned judge has found them, what is the consequence as regards the liability of the appellants? The appellants are a limited company and the ship was managed by another limited company, Messrs. John M. Lennard & Sons, and Mr. J. M. Lennard, who seems to be the active director in J. M. Lennard & Sons, was also a director of the appellant company, Lennard's Carrying Company, Limited. My Lords, in that state of things what is the question of law which arises? I think that it is impossible in the face of the findings of the learned judge, and of the evidence, to contend successfully that Mr. J. M. Lennard has shown that he did not know or can excuse himself for not having known of the defects which manifested themselves in the condition of the ship, amounting to unseaworthiness. Mr. Lennard is the person who is registered in the ship's register and is designated as the person to whom the management of the vessel was entrusted. He appears to have been the active spirit in the joint stock company which managed this ship for the appellants; and under the circumstances the question is whether the company can invoke the protection of s. 502 of the Merchant Shipping Act to relieve it from the liability which the respondents seek to impose on it. That section is in these words: "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely, —(i.) Where any goods, merchandise, or other things whatsoever

taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

Now, my Lords, did what happened take place without the actual fault or privity of the owners of the ship who were the appellants? My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. My Lords, whatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr. Lennard therefore was the natural person to come on behalf of the owners and give full evidence not only about the events of which I have spoken, and which related to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of s. 502. It has not been contended at the Bar, and it could not have been successfully contended, that s. 502 is so worded as to exempt a corporation altogether which happens to be the owner of a ship, merely because it happens to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody

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for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim respondeat superior the burden lies upon him to do so.

Well, my Lords, in that state of the law it is obvious to me that Mr. Lennard ought to have gone into the box and relieved the company of the presumption which arises against it that his action was the company's action. But Mr. Lennard did not go into the box to rebut the presumption of liability and we have no satisfactory evidence as to what the constitution of the company was or as to what Mr. Lennard's position was. The memorandum and articles of association were not put in. The only evidence was that of the secretary, Mr. Simpson, who told the Court that he was secretary not only to the company but also to the managing company, and the inference to be drawn is that the officials of the two companies were very much the same and transacted very much the same business. Under the circumstances I think that the company and Mr. Lennard have not discharged the burden of proof which was upon them, and that it must be taken that the unseaworthiness, which I hold to have been established as existing at the commencement of the voyage from Novorossisk, was an unseaworthiness which did not exist without the actual fault or privity of the owning company. My Lords, if that is so, then the judgment of the majority of the Court of Appeal and of Bray J. was right.

My Lords, there is another point which I have not entered upon, because it was not touched upon in the Court below, and that is the question as to whether the terms of the charterparty are such as to exclude the operation of s. 502 altogether. That question remains intact. It is not necessary to deal with it in this case and I therefore pass it by.

My Lords, for the reasons which I have given, I move that this appeal be dismissed, and dismissed with costs.

LORD DUNEDIN. My Lords, I concur, and I have but little to add to what the noble and learned Lord on the woolsack has said. It appears clearly from the facts, and indeed eventually was admitted by the appellants' counsel, that the loss which had its final outcome in the fire was really due to a set of defects in the steam power in the boilers which constituted unseaworthiness. In the Court below at the trial the principal controversy seems to have turned upon whether the fault in allowing the vessel to be unseaworthy was a fault committed by the captain at Novorossisk or was the fault of J. M. Lennard, the registered manager of the ship. I agree with what my noble and learned friend has said that the true view of the facts is that the fault was the fault of Lennard. But before your Lordships' House the chief argument has been, admitting that it was the fault of J. M. Lennard, whether that was actual fault or privity in the sense of s. 502 of the Merchant Shipping Act. The real question therefore turns upon what is to be the application of the words there used to a metaphysical conception like an incorporated company who cannot act directly themselves.

My Lords, I do not know that a case will ever arise in which that will need to be treated as a purely abstract proposition. I do not think it arises in this case, and I certainly incline to the opinion that it will be found always to depend upon the particular facts of the case. If I was bound to decide affirmatively in this case, I should be inclined to think that there was enough known about Lennard to show that, to use the appellants' learned counsel's own phrase, he was the alter ego of the company. He was a director of the company. I can quite conceive that a company may by entrusting its business to one director be as truly represented by that one director, as in ordinary cases it is represented by the whole board. I am quite sure that you cannot at least put as a general proposition in law that it is true that nothing will ever be the actual fault or privity of an incorporated company unless it is the actual fault of the whole board of directors. But, my Lords, I think the true criterion of the case is that which was found and applied by Hamilton L.J., that the parties who plead this 502nd section must bring themselves within its terms; and therefore the question is, have the company

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freed themselves by showing that this arose without their actual fault or privity? I think they have not. Lennard may have been deputed by the company to do all these things, or again there might have been liability upon the ground that Lennard had told the whole body of directors and that they knew and sent him the money, and so on. Anyway they have not discharged the onus which was upon them, and I therefore concur in the motion which has been made by my noble and learned friend on the woolsack.

LORD ATKINSON. My Lords, I concur.

LORD PARKER OF WADDINGTON. My Lords, I concur.

LORD PARMOOR. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 8, 1915.

Solicitors for appellants: *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

Solicitors for respondents: *Parker, Garrett & Co.*

[HOUSE OF LORDS.]

PARISH COUNCIL OF THE CITY PARISH OF EDINBURGH . . . . . } APPELLANTS;

AND

LOCAL GOVERNMENT BOARD FOR SCOTLAND . . . . . } RESPONDENTS.

H. L. (Sc.)* 1915 *March* 9.

Poor Law—Scotland—English-born Pauper—Warrant for removal to England—Appeal by Board of Guardians to Local Government Board—Competency—"Residence" of Pauper Lunatic—Poor Law (Scotland) Act, 1898 (61 & 62 *Vict. c.* 21), *s.* 5.

The Poor Law (Scotland) Act, 1898, s. 5, provides, sub-s. 1, that whenever any parish council has obtained a warrant for the removal from any parish in Scotland to England or Ireland of any English or Irish born poor person who has not acquired a settlement by residence and has not become irremovable under the preceding section, such poor person, "if he or she shall have resided continuously in such parish for not less than one year before the date of the application for relief," may appeal to the Local Government Board, and, sub-s. 2, that "in the case of a poor person as in the preceding sub-section mentioned" the board of guardians of the union or parish named in the warrant of removal may appeal to the Local Government Board; and in either case the Local Government Board shall determine whether the removal is reasonable or proper:—

Held, (1.) that the board of guardians had a right of appeal, whether the poor person had resided continuously in the parish or not; (2.) that "resided" as used in s. 5 did not import intelligent residence, but applied to the bodily presence of a pauper lunatic in the particular parish.

Decision of the Second Division of the Court of Session in Scotland, 1914 S. C. 241, affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary. (1)

The question for determination was whether it was competent to the respondents, the Local Government Board for Scotland,

* *Present:* EARL LOREBURN, LORD KINNEAR, LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

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under s. 5 of the Poor Law (Scotland) Act, 1898 (1), to entertain an appeal by the board of guardians of the union of St. Pancras against a warrant for the removal of a pauper lunatic named Mrs. Elizabeth Buckle or Scott from the parish of Falkland, in the county of Fife, to the St. Pancras Union, on the ground that such removal was not reasonable or proper.

The pauper was born in the parish of St. George's, Hanover

(1) Sect. 4 of the Poor Law (Scotland) Act, 1898, gives to English and Irish born paupers who have resided for five years in Scotland a status of irremovability, provided the pauper shall have maintained himself without having recourse to common begging either by himself or his family, and without having received parochial relief.

Sect. 5, sub-s. 1: "Whenever any parish council shall have obtained in terms of the Poor Law Removal Act, 1862, a warrant for the removal from any parish in Scotland to England or Ireland of any English born or Irish born poor person who has not acquired a settlement by residence in Scotland and to whom the immediately preceding section does not apply, such poor person, if he or she shall have resided continuously in such parish for not less than one year before the date of the application for relief (her deceased husband's residence, if necessary, being reckoned as part of her residence in the case of a widow), may, within fourteen days after intimation of the granting of such warrant and of the right to appeal in this subsection mentioned, appeal to the Local Government Board, which Board shall without delay investigate the grounds of such appeal, and determine whether it is reasonable and proper that such poor person shall be so removed. The inspector of poor of the parish whence the poor person is proposed to be removed shall be bound to intimate to the poor person the granting of the warrant and the right of appeal; and no warrant in terms of the Poor Law Removal Act, 1862, shall be carried out until the expiry of the said fourteen days, or, if an appeal is taken, until it has been disposed of by the Board."

Sub-s. 2: "In the case of a poor person as in the preceding subsection mentioned, the inspector of poor shall also be bound to send by registered letter a notice to the clerk to the board of guardians of the union or parish in England or Ireland named in the warrant of removal, that if they desire they may, within fourteen days after receipt of such notice, appeal to the Local Government Board against the removal, and shall with such notice transmit a copy of the depositions taken before the sheriff granting the warrant; and if the board of guardians shall so appeal, the Local Government Board shall without delay investigate the grounds of such appeal, and determine whether it is reasonable and proper that such poor person shall be so removed. No warrant, in terms of the Poor Law Removal Act, 1862, shall be carried out until the expiry of the said fourteen days, or, if an appeal is taken, until it is disposed of by the Board."

Square, in February, 1845; she was married in Edinburgh in February, 1867. In June, 1871, she became chargeable as a pauper lunatic in Leith and was sent to the Royal Edinburgh Asylum, Morningside, Edinburgh. The parish of St. Cuthbert's, Edinburgh, admitted liability for her maintenance in respect of her husband's residential settlement and continued to maintain her until the beginning of May, 1907, when her son accepted the responsibility. For a month in 1885 she was boarded out in the parish of Kennoway, Fife; from February 25, 1885, to August 11, 1903, she was boarded out in the parish of Kettle, Fife, and thereafter at Freuchie, in the parish of Falkland, Fife. During all this period she was of unsound mind. Her husband died in 1906. The lunatic had not acquired a residential settlement in Scotland. The cost of her maintenance in Fife was borne by her son from May 1, 1907, until August 11, 1910, when he died, leaving no funds available for his mother's maintenance. Shortly after his death the person with whom the lunatic was boarded out applied to Falkland parish for relief, which was granted, and the poor law authority of Falkland claimed relief from the appellants, the parish council of the city parish of Edinburgh, who refused the claim. Thereupon the inspector of poor of the parish of Falkland applied to the sheriff of the county for a warrant authorizing the removal of the lunatic to the St. Pancras Union, London, in terms of the Poor Law Removal Act of 1862. The sheriff, after hearing evidence on behalf of the applicant, granted the warrant craved on May 16, 1911.

These proceedings were not intimated to the board of guardians of the St. Pancras Union; but after the warrant was obtained it was communicated to them. Thereupon the board of guardians appealed to the respondents under s. 5 of the Poor Law (Scotland) Act, 1898. The respondents, having considered the question, on August 4, 1911, sustained the appeal and determined that it would not be reasonable or proper that the said Elizabeth Buckle or Scott should be so removed; and further, on May 20, 1912, determined that the expense of maintenance should be borne as from August 4, 1911, by the parish councils of Edinburgh and Falkland in the proportions of thirty-six fortieths and four fortieths respectively.

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The appellants then raised an action against the Local Government Board for Scotland (the respondents), the pauper lunatic, the parish council of the parish of Falkland, and the guardians of the poor of the union of St. Pancras (1.) for declarator that the warrant for removal was properly obtained and that the respondents had no power to interfere with the operation of the warrant by virtue of the provisions of the Poor Law (Scotland) Act, 1898, or otherwise; and (2.) for reduction of the minutes or orders of the respondents of August 4, 1911, and May 20, 1912, as being ultra vires of the Board and incompetent. The action was defended by the respondents alone.

Lord Skerrington (Lord Ordinary) held that the minutes complained of were ultra vires and without statutory warrant and reduced them accordingly, but his interlocutor was recalled by the Second Division (Lord Dundas, Lord Salvesen, the Lord Justice-Clerk, and Lord Guthrie).

Scott Dickson, K.C. (Dean of Faculty), and *Roberton Christie, K.C.* (with them *J. D. Dallas*) (all of the Scottish Bar), for the appellants. This appeal depends upon the construction of s. 5 of the Poor Law (Scotland) Act, 1898. There are two questions: (1.) What is the meaning of "resided" in sub-s. 1; (2.) whether the right of appeal conferred on the board of guardians is absolute or applies only in the case of a pauper lunatic who has fulfilled the condition as to residence in sub-s. 1. The Courts below dealt with the first point only. As to (1.), s. 1 of the Act of 1898 repeals s. 76 of the Poor Law (Scotland) Act, 1845, and re-enacts it, using the same language, save that the period of residence required to acquire a settlement by residence is reduced from five to three years. But the words "residence" and "reside" in the Act of 1845 have been repeatedly construed as implying a capacity to reside and as excluding the residence of an idiot or a lunatic: *Crawford and Petrie* v. *Beattie* (1); and those words must obviously bear their technical meaning in s. 1 of the Act of 1898. But if the word "reside" bears its technical meaning in s. 1 it should have the same meaning in s. 5. Where the words of an Act have by judicial interpretation acquired a technical

(1) (1862) 24 D. 357.

meaning the Legislature in subsequent legislation dealing with the same subject-matter must be presumed to have used those words in the sense in which they have been judicially interpreted: *Parish Council of Kilmalcolm* v. *Parish Council of Glasgow*. (1) Sect. 4 gives to English and Irish born paupers who have resided for five years in Scotland a status of irremovability. In the English Act which deals with the question of irremovability, the Poor Removal Act, 1846, s. 1, residence in a lunatic asylum or duly licensed house is excluded from the qualifying period. That supports the view that "reside" in ss. 3, 4, and 5 of the Act of 1898 should bear its technical meaning, otherwise there would be different standards of irremovability in the two countries. As to (2.), the words in sub-s. 2, "as in the preceding sub-section mentioned," import the condition as to residence in the parish.

T. B. Morison, K.C., Solicitor-General for Scotland (of the Scottish and also of the English Bar), and *J. C. Pitman* (of the Scottish Bar), for the respondents, were not called on.

Earl Loreburn. My Lords, in this appeal the real question is whether the Local Government Board had the power to determine that the removal of a pauper lunatic from Fife to London was unreasonable and improper. We have nothing to do with the value, so to speak, of their decision, provided they had the jurisdiction and authority to give it. The question turns upon the Poor Law (Scotland) Act, 1898, s. 5, sub-ss. 1 and 2, and I had better state what my view is of those two sub-sections shortly and compendiously. Where there is a warrant for the removal from Scotland to England or to Ireland of any English born or any Irish born poor person who has not acquired a settlement by residence in Scotland, and to whom the immediately preceding section does not apply, rights of appeal are given. First, the poor person can appeal if he or she has resided continuously for a certain period in Scotland. Secondly, the guardians of the English or Irish parish which is to be charged can appeal, and the condition as to the continuous residence does not apply to their appeal at all. In other words, the poor person can appeal if he or she has resided continuously,

(1) [1906] A. C. 344, at p. 352; 8 F. (H. L.) 12, at p. 14.

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and the guardians can appeal whether or not the poor person has resided continuously, and that seems to me to be so whatever meaning you give to the word "reside."

My Lords, this point, we were told, was argued in the Court of Session, but does not appear to have been argued before the Lord Ordinary. If it is decided as I respectfully recommend your Lordships to decide it, then no other point arises. The point in question was not noticed in the judgments in the Inner House. I prefer to rest my opinion upon that ground, which is a very short and a very simple ground, and to my mind a very plain ground. If that be repelled, and the point which was raised and decided in the Court of Session falls to be considered, then I agree with Lord Dundas as to the judicial construction of the words "reside" and "residence." Had I not been willing to recommend the dismissal of this appeal upon one ground, I should have been prepared to assent to that also.

LORD KINNEAR. My Lords, I entirely agree with my noble and learned friend on the woolsack. I cannot help thinking that there is some confusion introduced into the argument by an erroneous assumption that the word "residence" is a technical term bearing one and the same meaning wherever it occurs, at least in the Poor Law Acts. The Acts to be construed are of course the Acts of 1845 and 1898. It appears to me that the enactment in question is expressed in ordinary language, and for that very reason it is language which is open to construction. It has been construed over and over again, and there is no dispute, as I understand, as to the construction which the Court has put upon it, at least since 1845. But then the clause has been construed, not by picking out one particular word and affixing a technical signification to that word, but by taking the whole clause together and interpreting its ordinary language according to the obvious meaning, to be specialized only by a reference to the context and to the subject-matter, and in particular, I think, with reference to the existing law, which the Act of 1845 assumes to be established, and which it purports to amend.

My Lords, I have no doubt at all that, taking all these matters

into consideration, it has been decided in Scotland that according to the true construction of the Act of 1845 the residence which is necessary to acquire a settlement must be the residence of a person capable from mental capacity of acquiring or of abandoning a civil status. It has been held to imply an element of choice and persistency of purpose of which infants and lunatics are deemed to be incapable, and therefore it has been said that these are not persons capable of acquiring a settlement, but must take the settlement of their parents. But then I think it follows that when you come to read the word "residence" in a different context and with reference to a different subject-matter, you must construe it as a word of ordinary language under new conditions, and I agree with Lord Dundas that it is inappropriate to apply the judicial construction of s. 76 of the Act of 1845 to the language, however similar, of s. 5 of the Act of 1898, which deals with "a quite different and separate category of poor law administration." It has not been decided that a lunatic can never be said to reside anywhere, but only that he does not acquire a settlement by a residence which is fixed for him without choice or purpose of his. But the 5th section has nothing to do with the conditions on which a settlement may be acquired, but is concerned with the removal of a pauper to England or Ireland by force of law and without his own consent. But then if I were wrong in that I should agree with my noble and learned friend that the question is excluded altogether by the point which he stated first upon the construction of the 1st and 2nd sub-sections of the 5th section of the 1898 Act. The 1st sub-section provides for the case of an English born or Irish born poor person who has not acquired a settlement by residence and to whom the immediately preceding section does not apply. Such poor person may upon a certain condition appeal to the Local Government Board. Now I think that the words describing the case in which an appeal may be presented by a poor person are those, and those only, which I have already read. But then the section goes on to say: "If he or she shall have resided continuously in such first mentioned parish for not less than one year before the date of the application for relief," he or she "may, within fourteen days after intimation of the

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granting of such warrant and of the right to appeal in this sub-section mentioned, appeal." That is not part of the description of the poor person who may be entitled to appeal. In other words, it is not part of a case in which an appeal may be presented, but it is a condition upon which alone the poor person may appeal; and therefore I think when the statute goes on to provide for the same case as before, the case of a poor person as in the preceding sub-section mentioned, and gives a separate right of appeal to a different person, to wit the board of guardians, without repeating the condition on which alone the pauper himself is allowed to appeal, the necessary inference is that the second right of appeal is not conditioned in the same way. The pauper may appeal for his own interest provided he has resided for a certain period in the place from which he is to be removed. The board of guardians may appeal in a totally different interest, if they consider it unreasonable and improper that the maintenance of a pauper should be imposed on their parish or union, irrespective of the period of his residence in a particular parish in Scotland.

Lord Dunedin. My Lords, I concur with the opinion of the noble and learned Earl, that the logical way of disposing of this appeal is to hold that the appeal given to the Local Government Board is absolute. That view, of course, is destructive of the suggestion which was made by Lord Salvesen in his opinion, that it would be more reasonable if the two appeals had been alternative—a suggestion which I venture to think would never have been made if the learned judge had been at all conscious of the grievance which this Act of Parliament was sought to remedy. But as regards the other point, which I do not think logically arises, I have nothing to add to the judgment of Lord Dundas, which is entirely satisfactory to me.

Lord Atkinson. My Lords, I concur with Lord Dundas in the construction which he has placed upon s. 5, sub-s. 1, and, if I may, I beg to adopt it. I also concur with the three noble and learned Lords who have preceded me as to the proper construction of sub-s. 2 of s. 5.

Lord Parker of Waddington. My Lords, I also concur on both points.

Lord Sumner. My Lords, so do I.

Lord Parmoor. My Lords, I concur on both points.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, March 9, 1915.

Agents for appellants: *Grahames, Currey & Spens, for R. Addison Smith & Co., W.S., Edinburgh.*

Agents for respondents: *John Kennedy, W.S., for Macrae, Flett & Rennie, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* 1915 *May* 11.

PARKER (Pauper) . . . . . Appellant;

AND

OWNERS OF SHIP BLACK ROCK . . . . Respondents.

Employer and Workman—Compensation—Accident arising out of Employment—Seaman—Return to Ship—Ashore to buy Provisions—Agreement that Crew should find their own Provisions—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A fireman on board a steamship went ashore, with leave, to buy provisions for himself. When he endeavoured to return to the ship the night was rough and dark, and he fell off the pier where the ship was supposed to be (though in fact she had been moved) and was drowned. In his contract of service, which was contained in a printed document issued by the Board of Trade, the Board of Trade scale of provisions was

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* *Present:* Earl Loreburn, Lord Parker of Waddington, Lord Sumner, Lord Parmoor, and Lord Wrenbury.

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struck out and the words "Crew to provide their own provisions" were substituted:—

Held, that the deceased owed no duty to his employer to go ashore to buy provisions and that his death was not caused by accident arising out of his employment.

Decision of the Court of Appeal [1914] 2 K. B. 39 affirmed.

APPEAL from a decision of the Court of Appeal affirming an award made by the county court judge of Liverpool under the Workmen's Compensation Act. (1)

The appellant, who was the widow of Christopher Parker, a fireman on board the respondents' ship *Black Rock*, claimed compensation in respect of her husband's death.

On January 7, 1913, Parker signed an agreement for a round coasting voyage in the *Black Rock*. The contract for service was contained in a printed document issued by the Board of Trade, but before Parker signed, the scale of provisions required by s. 25 of the Merchant Shipping Act, 1906, to be served out to the crew during the voyage (where the crew do not furnish their own provisions) was struck out and in lieu thereof were inserted in writing the words "Crew to provide their own provisions." The terms of the contract are fully set out in the report of the case in the Court of Appeal.

The ship arrived at Newlyn, Cornwall, about 2 P.M. on January 14, 1913, and moored inside the North Pier. In the afternoon Parker went ashore with another fireman, and it was assumed that he went ashore with leave. About 6.30 P.M. they went into a provision shop situated opposite the landward end of the pier and bought provisions for themselves. Parker then went off in the direction of the North Pier, apparently for the purpose of joining his ship, and was never seen again alive. In point of fact the ship was no longer at the North Pier but had been moved shortly after 6 P.M. to the South Pier, but this fact was not known to the deceased. The night was dark, it was raining, and there was a strong gale blowing. Shortly after the time the deceased left the provision shop a man on shore heard shouts as of a man drowning coming from the water about the end of the North Pier. He called two boatmen, who put out in

(1) [1914] 2 K. B. 39.

the direction of the sound, but the shouts ceased before they got to the spot. The next morning the body of the deceased was found cast up on the shore at a place where a body would be expected to be cast up if it fell into the water about the end of the North Pier.

The county court judge inferred from these facts that the deceased met with an accident while endeavouring to return to the ship after buying provisions, but thought that he was precluded by *Mitchell* v. *Owners* of *S.S. Saxon* (1) from holding that the accident arose out of the deceased's employment. He therefore made an award in favour of the respondents.

The Court of Appeal (Cozens-Hardy M.R. and Eve J., Sir Samuel Evans, President, dissenting) affirmed this award on the ground that the deceased was on shore for his own purposes and not in fulfilment of any obligation imposed on him by his contract of service.

Howard Jones and *Elliot Gorst*, for the appellant. The question is whether the deceased met his death by an accident arising out of his employment.

1. In this case there was a special contract imposing on the seaman an express or implied obligation to go ashore and provide himself with provisions, and, further, this was a necessity arising out of the circumstances of the employment. It was admitted that the seamen could go ashore without express leave and that this man went ashore to buy provisions. The county court judge would have decided this point in favour of the appellant but for *Mitchell* v. *Owners of S.S. Saxon* (1); but that is not an authority to the contrary because the point was not present to the mind of the Court. The Court of Appeal in this case proceeded on the view that the words of the contract in question " Crew to provide their own provisions " imposed no contractual obligation on the seamen but merely stated a fact. This point was not suggested in the county court, and it was objected on behalf of the appellant that the point was not open to the respondents in the Court of Appeal. In the county court the articles were not forthcoming and secondary evidence

(1) (1912) 5 B. W. C. C. 623.

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was given of their contents, but in the Court of Appeal the articles themselves were produced and were admitted in evidence. There is in fact no difference between the effect of the document produced in the Court of Appeal and the parol evidence of the document given in the county court, but, assuming that any difference exists, it is submitted that the Court of Appeal were wrong in admitting the document.

2. If the man was lawfully on shore but not on ship's business the North Pier was part of the access to the ship—or at any rate he was in a region of danger specially due to the nature of his employment: *Moore* v. *Manchester Liners.* (1)

Alexander Neilson and *W. Greaves Lord*, for the respondents, were not called on.

EARL LOREBURN. My Lords, I think your Lordships will all agree that this case has been presented to us with great ability and with singular fairness, and that the argument which we have heard has assisted us in coming to our conclusion, but I do not think we need to call upon learned counsel for the respondents. Did this injury arise out of this man's employment as a seaman on board this ship; did his employment involve as one of the things belonging to the employment that he should come ashore to get food and then return the same evening? My Lords, I cannot think that the case can be regarded as one in which it was his duty to his employers to come ashore and to be ashore and return to the ship. However much one may have sympathy, and we all must have sympathy with the widow, we ought not to allow our feelings to lead us beyond our duty. I have read the judgment of the learned county court judge and I take his facts as found and his inferences from the facts as found, and I cannot see that upon those facts the accident arose out of the employment.

LORD PARKER OF WADDINGTON. My Lords, the accident in this case took place during the absence of the employee from the vessel upon which he was engaged. He came on shore, and I think that under the circumstances it must be presumed that he

(1) [1910] A. C. 498.

came on shore with the leave of his employer, and it was during that absence from the ship that the accident occurred. Now it is not sufficient in order to make this an accident arising out of the employment that the accident happened during a period when the man was lawfully absent from the vessel. In order to make it an accident arising out of the employment the absence from the vessel must be in pursuance of a duty owed to the employer. It appears to me that that is, shortly stated, the result of the decided cases. It is a line of decisions which lays down a distinctly workable rule upon the construction of an Act, the obscurity of which is exceedingly great, and I should be unwilling in any way to interfere with it.

Now it is desired in the present case to show that the absence from the ship was pursuant to a duty owed to the employer, but I think that the effort to do so breaks down. It is said that the man was on shore to purchase provisions, that he was under a contractual obligation to his employer to purchase provisions and to feed himself, and that consequently he was absent from the ship pursuant to a duty owed to the employer. The facts of the case are, shortly, these: Under the statutes the employer, if the workman does not provide his own provisions (as he did in this case), is bound to supply them, and the statutory form is a form whereby the employer contracts to supply provisions to seamen in accordance with a scale specified in a schedule. As a matter of fact when they came to contract, the employer and the seamen in this case agreed that the statutory provision should not apply, and of course the consequence was that the workman had to supply his own provisions so far as he required them, and he would require them in the normal course of nature. It was proved before the county court judge that the form which that contract took was "Crew to supply their own provisions," and I have no doubt whatever that according to the proper construction of those words the seamen did not come under any contractual obligation which the master could enforce. It merely means that the master is freed from an obligation which he might otherwise be subject to.

That being the case, I do not think that I need enter in any way into the question as to whether the Court of Appeal were

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justified or otherwise in looking at the original contract, the contract before the county court judge having been proved by secondary evidence.

My Lords, that appears to me entirely to dispose of the case. I cannot, in the state of the authorities, assent to the further proposition that was made to the effect that if a man goes on shore lawfully for a purpose which must have been contemplated as one of the purposes for which he would go on shore, that makes him on shore upon the ship's business or pursuant to any duty owed to his employer. The only possible way, as it appears to me, of putting the facts of the case in a light favourable to the seaman is that which has been suggested in the course of the argument, namely, that it being an extraordinarily dark stormy night, and the proper and usual method of regaining the ship being by way of the North Pier, and the accident having evidently happened during transit from the land along the North Pier to the place where the ship was supposed to be, the pier may be considered as the access to the ship, and that an accident happening during the course of using that access might be, within the cases, an accident in the course of the employment. But, after all, that was a matter for the county court judge, and there is no finding in the judgment of the county court judge from which I think we in this House are justified in drawing any inference. I conclude therefore that the appeal fails.

LORD SUMNER. My Lords, I agree. It is enough to take the evidence and his Honour's findings. The deceased signed the articles, says the master, the only witness on the point. The Board of Trade scale of provisions was crossed out and "Crew to provide their own provisions" was inserted. Upon this secondary evidence of the written agreement it becomes a question of construction to decide what is meant by the erasure and the insertion of "Crew to provide their own provisions." I think it does not constitute any promise by the seamen severally to the master of the vessel that they would as a duty towards him provide themselves with their own provisions. Could he have recovered damages if one of them had provided no provisions or not enough? Could he have dismissed one of them

because he preferred to be abstemious instead of providing himself amply with food? The answer in each case must be No.

That being so, there is no contractual obligation which made the deceased's errand on shore part of his employment in itself. It is suggested that as, in fact, he fed himself while on board, going ashore at a convenient port to get provisions constituted such a moral necessity arising specially from the terms upon which he was on beard as places his errand on the same footing as though he had gone to discharge a duty to the ship. No authority is stated for that proposition, and I do not think it can be accepted.

My Lords, little need be said about what was suggested as the admission of a new fact in the Court of Appeal. I am unable to appreciate why it should be called a new fact, that is to say, an attempt to decide the case upon materials other than those which were before the county court, when the Court of Appeal looked at the best evidence of a written agreement, namely, the agreement itself, which by that time had come back from sea and was forthcoming, instead of simply looking at the secondary evidence which was given in the county court. In any case the two together seem to amount to precisely the same thing. A copy has been produced to us. There is a statutory provision that an erasure must be attested by the superintendent, and on the face of the copy produced it seems to me to be quite consistent with its appearance that it has been so attested, and I do not think we need go behind its appearance.

My Lords, the remaining point that was made (and I am sure that no further point could have been made) was that the accident could be brought within those cases in which a man, having gone on shore for his own lawful purposes, is returning to his ship, and has so nearly approached the means of access to the ship as to make it reasonable to hold that he has returned to the sphere in which his employment operates, and therefore that the accident arises out of the employment. I do not think this has ever been extended for any great distance. All that we know of this man's death is that it took place by falling off the North Pier somewhere between the grocer's shop and the end of the pier where the ship was not, though he thought that she was there. The pier is a quarter of a mile long. Whether or not that long pier was all one means of access to an absent ship I will not say, but I think

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it is quite clear, as the county court judge has found nothing about it, that the argument is unsustainable before your Lordships.

I agree that the appeal fails.

LORD PARMOOR. I concur. I think that there was no such contractual obligation as was contended for by the learned counsel for the appellant. For my own part I do not see any difference between the evidence of the contract which was before the learned county court judge and the actual document when it was produced before the Court of Appeal. I think it is clear that Christopher Parker, on whose behalf the claim is made, was not absent from the ship in pursuance of any duty owed to the employer, and, in the absence of such duty, no liability would arise under the provisions of the Workmen's Compensation Act.

As regards the second point, I think that that is concluded by the finding of the learned county court judge. There are only a few words which I wish to read because I think that the facts are conclusive against any claim under this second heading. "The facts of the case do not bring the applicant within the Act because beyond drawing the inference that he met with an accident while endeavouring to return to the ship after buying the provisions I am unable to draw any further inference as to the point of the accident except that it was somewhere on the North Pier."

My Lords, I agree that the appeal should be dismissed.

LORD WRENBURY. My Lords, the question in this case is whether the accident was one arising out of the employment. The accident in question was that the man in returning to his ship from a lawful outing upon shore fell into the water and was drowned. In order to succeed it is not sufficient that he should show that but for his employment he would not have been at the scene of the accident. He must do more than that; he must show that it was the employment which took him to the place of accident. He has sought to do that in either one of two ways. In the first place his counsel has said that he was contractually bound towards his employer to do the act for the purpose of doing which he went on shore—that he was contractually bound to supply himself with provisions, that he

went on shore to get provisions, that he was discharging his duty to his employer when he fell into the sea, and that therefore he is entitled to recover. If the premises were granted I agree that the conclusion would follow, but the premises seem to me to be wrong. Under the Board of Trade form, in the absence of anything to the contrary, it would be for the master to supply the crew with provisions. The only effect of that which was put into the agreement, namely, "Crew to provide their own provisions," was, I think, this—that the clause having been struck out which threw the obligation upon the master to supply the provisions, the fact is noted that the master is discharged from the obligation which otherwise would have rested upon him. It appears to me, therefore, that there was no such contract.

But then it was said that, contract or no contract, at any rate under the circumstances the man was bound to get provisions in order to sustain himself during the next journey of the vessel, that that was a duty which he owed, and he was performing that duty. It seems to me that from the stipulation that he was to get his own provisions this consequence ensued—that the master was bound to give him reasonable facilities from time to time for going to buy them, but it does not follow that when he was buying them he was discharging any duty towards his employer. The man was doing an act which under the circumstances he had to do, but he was not doing an act which he owed to his employer the duty to do, and between those two things it appears to me rests the ground upon which this case is to be decided. It appears to me that this accident did not arise out of his employment, that it did not result from any obligation which had to be satisfied in order for him to perform the duty of his employment.

My Lords, for these reasons I agree that the appeal fails and should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, May 11, 1915.

Solicitors for appellant: *Griffiths & Roberts, for R. E. Warburton, Liverpool.*

Solicitors for respondents: *Holman, Birdwood & Co.*

[PRIVY COUNCIL.]

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March 19; *April* 15.

THE TORONTO POWER COMPANY, LIMITED . . . . . } APPELLANTS;

AND

KATE PASKWAN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Negligence—Employer and Workman—Plant—Safety Appliances—Duty of Employer.

The duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself, and cannot be delegated to his servants. He is not bound to adopt all the latest improvements and appliances; it is a question of fact, in each particular case, whether there has been a want of reasonable care in failing to install the appliance the absence of which is alleged to constitute negligence.

APPEAL from a judgment of the Supreme Court of Ontario, Appellate Division (February 5, 1914), affirming the judgment of Kelly J. at the trial.

The respondent's husband, while in the employment of the appellants, was killed by the falling of a block from a travelling crane used in their power-house. The block fell owing to the overwinding of a drum which hoisted a chain to which the block was attached. The respondent sued the appellants in the Supreme Court of Ontario, on behalf of herself and children, for damages both under the Families Compensation Act (R. S. Ont. 1897, c. 166), which corresponds to Lord Campbell's Act, and under the Workmen's Compensation for Injuries Act (R. S. Ont. 1914, c. 156), which is similar to the English Employers' Liability Act. The facts of the case and the nature of the evidence at the trial appear from the judgment of their Lordships.

The jury found, inter alia, that the accident was due to the negligence of the appellants, through their master mechanic, in failing to install proper safety appliances and to employ a

* *Present:* LORD ATKINSON, LORD PARMOOR, SIR GEORGE FARWELL, and SIR ARTHUR CHANNELL.

competent signalman. They assessed the damages at $6000 if the appellants were liable under the former Act, and at $3000 if they were only liable under the Workmen's Compensation for Injuries Act.

The learned judge entered judgment for $6000, and this judgment was affirmed by the Appellate Division.

D. L. McCarthy, K.C., for the appellants. The appellants employed competent engineers and mechanics to carry on the mechanical operations of the plant. The evidence shows that the appellants were governed by the advice of their chief engineer as to the appliances to be adopted. Lord Cairns in *Wilson* v. *Merry* (1) said: "What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do." The appellants by giving to their engineers a discretion as to the appliances to be installed in effect furnished "adequate materials and resources," including all appliances necessary. The duty to install proper safety devices is one which, like the duty to keep the plant in proper repair, can be delegated by the master to competent persons. If, therefore, there was negligence it was that of the appellants' servants, and the doctrine of common employment applies. [*Searle* v. *Lindsay* (2), *Johnson* v. *Lindsay & Co.* (3), *Hedley* v. *Pinckney & Sons Steamship Co.* (4), *Cribb* v. *Kynoch* (5), and *Young* v. *Hoffmann Manufacturing Co.* (6) were referred to.]

T. N. Phelan, for the respondent, was not called upon.

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April 15.

The judgment of their Lordships was delivered by

SIR ARTHUR CHANNELL. This is an appeal from the judgment of the Appellate Division of the Supreme Court of Ontario confirming the judgment of Kelly J. whereby he directed judgment

(1) (1868) L. R. 1 Sc. & D. 326, at p. 332.
(2) (1862) 11 C. B. (N.S.) 429.
(3) [1891] A. C. 371.
(4) [1894] A. C. 222.
(5) [1907] 2 K. B. 548.
(6) [1907] 2 K. B. 646.

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to be entered, after a trial before a jury, in favour of the respondent for the sum of $6000.

The respondent is the widow of one John Paskwan, who was killed on February 8, 1913, by an accident on the works of the appellant company, in whose service he then was, having entered their employment on that day. The respondent brought the action on behalf of herself and two children of hers, stepchildren of the deceased, who were alleged to be dependent upon him, and she alleged that the appellants were liable both under an Ontario Act corresponding to Lord Campbell's Act and under the Workmen's Compensation for Injuries Act, which corresponds to the English Employers' Liability Act. The jury at the trial answered certain questions put to them by the learned judge and found $3000 as the damages if the liability was the restricted liability of the Workmen's Compensation for Injuries Act, and $6000 if the defendants were liable under Lord Campbell's Act, and the learned judge afterwards entered judgment for the $6000.

The deceased man was working as a rigger and had been preparing some logs for hoisting by a travelling crane, and was waiting to hitch on the logs when he was killed by the falling of a block from the crane. The cause of the block falling was the overwinding of the drum which hoisted the chain on which the block was. It was not contended in the Supreme Court of Ontario or before this Board that there was not a clear case proved of negligence by fellow-workmen giving a cause of action under the Workmen's Compensation for Injuries Act, and the only question on the appeal is as to the liability of the appellants under Lord Campbell's Act. The suggested grounds for holding them liable are that they ought to have provided some kind of safety device which would have prevented the overwinding, or that in default of such a device they ought to have employed a signalman to give warning to the crane operator when he ought to stop winding. The respondent called several witnesses who spoke to two different kinds of safety apparatus which they had seen in use at other works, and it could hardly be said that at the end of the plaintiff's case there had not been made a case which must have been left to the jury. Indeed no submission on this point seems to have been made at that stage. The defendants' answer

to this case was that the directors of the company did not take any personal part in the superintendence of the mechanical work of the company but employed a competent man as mechanical superintendent. It appeared from the defendants' evidence that on an occasion some two years before the accident to Paskwan the hook had fallen from overwinding in the same way, and that the defendants' superintendent had then visited other works, including those mentioned by the plaintiff's witnesses, to see the safety devices there in use, and that he came to the conclusion that they were not satisfactory, and accordingly no safety appliance was installed; as to the signalman, the defendants' case was that the operator had a clear view and could see as well as any signalman could have done. The learned judge left three questions to the jury in addition to the question of the amount of damages.

(1.) Was the death of deceased, John Paskwan, caused by negligence or was it a mere accident? To which the jury answered "negligence."

(2.) Was the casualty or accident caused by the negligence of the defendants or of any person or persons in the employ of the defendants? Answer.—Yes.

(3.) If so, state fully and clearly whose negligence it was and what were the act or acts or omission or omissions which caused or brought about the accident? Answer.—The defendant company were negligent through their authorized employees, namely, through their master mechanic, for failing to install proper safety appliances and to employ a competent signalman. Through their foreman rigger for failing to give proper attention to the descent of the large hook and to leave the craneman to watch the small block. Through the craneman for neglecting to stop the small hook at its proper place.

On these findings the learned judge entered judgment for the larger of the two sums found by the jury as on a common law liability.

The summing up of the learned judge is not now complained of, nor is it contended that if there was evidence which ought to have been left to the jury their finding ought to be set aside as perverse or one which the jury could not reasonably find. The

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contention of the defendants is that they performed their duty by leaving the selection and care of the plant to a competent man, and they rely mainly on a well-known passage in the judgment of Lord Cairns in *Wilson* v. *Merry*. (1) Reliance was also placed on *Cribb* v. *Kynoch* (2) and *Young* v. *Hoffmann Manufacturing Co.* (3) It is, of course, true that a master is not bound to give personal superintendence to the conduct of the works, and that there are many things which in general it is for the safety of the workman that the master should not personally undertake. It is necessary, however, in each case to consider the particular duty omitted, and the providing proper plant, as distinguished from its subsequent care, is especially within the province of the master rather than of his servants.

In *Cribb* v. *Kynoch* (2) and *Young* v. *Hoffmann Manufacturing Co.* (3) the question arose as to the duty of a master to have inexperienced persons in his employ properly instructed in the way to perform dangerous work, and that is a matter which it is fairly obvious must in almost all cases be done for the master by others. The supplying of that which in the opinion of a jury is proper plant stands on rather a different footing. It is true that the master does not warrant the plant, and if there is a latent defect which could not be detected by reasonable examination, or if in the course of working plant becomes defective and the defect is not brought to the master's knowledge and could not by reasonable diligence have been discovered by him, the master is not liable, and, further, a master is not bound at once to adopt all the latest improvements and appliances. It is a question of fact in each case, was it in the circumstances a want of reasonable care not to have adopted them: see per Willes J. in *Hanson* v. *Lancashire and Yorkshire Ry. Co.* (4) Here the nature of the accident must be borne in mind. Accidents from overwinding are by no means uncommon with all kinds of hoisting machinery. They arise from negligence of the operator, but it is a kind of negligence so likely to occur that a jury may well consider that safety appliances should be provided. In mine shafts it is in this country compulsory to do so. In the present case the jury may

(1) L. R. 1 Sc. & D. 326, 332.
(2) [1907] 2 K. B. 548.
(3) [1907] 2 K. B. 646.
(4) (1872) 20 W. R. 297.

well have thought that even if the particular appliances spoken of by the plaintiff's witnesses, and inspected by the defendants' manager after the former accident, were not entirely satisfactory, still there could have been no real difficulty in installing a safety device, and that ought to have been done. Then, is it an answer that a master whose attention has been called by a previous occurrence to the danger from overwinding should take the advice either of his manager or any other person whom he presumes to be more skilled than himself, and on such advice do nothing? The jury might perhaps under such circumstances have found that there was no want of reasonable care and only an error of judgment, but this jury have not done so. It is enough to say, as both the judge who tried the case and the judges on appeal in the Supreme Court have said, that there was a case which could not have been withdrawn from the jury, and that the jury have found against the defendants. The learned judge could not have ruled that as a matter of law the answer of the defendants was necessarily conclusive in their favour. It is unnecessary to go so far as Middleton J. did in the Court below and say that the jury have come to the right conclusion. It is enough that they have come to a conclusion which on the evidence is not unreasonable. Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Charles Russell & Co.*
Solicitors for respondent: *Blake & Redden.*

[PRIVY COUNCIL.]

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March 15, 16; *April* 20.

GRAND TRUNK RAILWAY COMPANY OF CANADA . . . . . } APPELLANTS;

AND

ARTHUR ROBINSON . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Railway—Personal Injuries—Negligence—Man in Charge of Horse —"Livestock Special Contract"—Condition—Exemption from Liability —Railway Act-(R. S. Can., 1906, *c.* 37), *s.* 284, *sub-s.* 7; *s.* 340.

The respondent, by arrangement with the owner of a horse, travelled in charge of it upon the appellants' railway. The owner's representative, in the presence of the respondent, signed a "livestock special contract," in a form authorized by the Board of Railway Commissioners for Canada. This contract provided for the carriage of the horse and contained, upon its face, a condition relieving the appellants from liability for death or injuries, even where caused by negligence, to a person permitted to travel with the horse at less than full fare. The document was handed to the respondent in order, as he knew, to show that he was travelling with the horse, but neither he nor the owner's representative read the conditions. A half fare was charged for the conveyance of the respondent, and, together with the freight for the horse, was payable by the owner upon delivery. Across the face of the contract was printed in large red type "Read this special contract," and at the side was written (but not as part of the authorized form) "Pass man in charge half fare."

The respondent, having been injured during the journey by the negligence of the appellants, sued to recover damages:—

Held, (1.) that the true inference was that the respondent accepted the document knowing that it contained a contract made on his behalf for his conveyance, and that he was bound by the condition on its face exempting the appellants from liability; (2.) that the appellants were entitled, under s. 340 of the Railway Act (R. S. Can., 1906, c. 37), to rely upon the form of contract authorized by the Railway Board giving them complete freedom from liability in the case of negligence, notwithstanding s. 284, sub-s. 7, of that Act.

APPEAL by special leave from a judgment of the Supreme Court of Canada (May 6, 1913) reversing a judgment of the Supreme Court of Ontario, Appellate Division (November 19, 1912), and restoring the judgment of Latchford J. at the trial.

* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD PARMOOR, SIR GEORGE FARWELL, and SIR ARTHUR CHANNELL.

The respondent sustained personal injuries while he was travelling upon the appellants' railway in charge of a horse. He sued the appellants in the Supreme Court of Ontario to recover damages for negligence. The appellants admitted negligence, but pleaded that they were exempt from liability by reason of a condition in a "livestock special contract," which had been signed by the appellants' agent and by one Dr. Parker, in the presence of the respondent and handed to the respondent, under circumstances which are fully stated in the judgment of their Lordships. The special contract in question was in a form authorized by an order of the Board of Railway Commissioners and contained on its face the following condition: "In case of the company granting to the shipper, or any nominee or nominees of the shipper, a pass or a privilege at less than full fare to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit and at the owner's risk as aforesaid, then as to every person so travelling on such a pass or reduced fare the company is to be entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the company, or its servants or employees or otherwise howsoever."

Across the contract was printed in large red type "Read this special contract," and at the side was written (but not as part of the authorized form) "Pass man in charge half fare." No fare was paid by the respondent, but a half fare was charged for his conveyance and was made payable by the consignee of the horse upon delivery.

The jury at the trial found a verdict for the respondent for $3000 and judgment was entered accordingly.

The Appellate Division, by a majority (Garrow, Maclaren, and Meredith JJ.A., Magee and Lennox JJ.A. dissenting), set aside the judgment of the trial judge and entered judgment for the appellants.

Upon appeal by the respondent to the Supreme Court of Canada that Court (Davies, Idington, Duff, Anglin, and Brodeur JJ., Sir Charles Fitzpatrick C.J. dissenting) reversed the decision of the Appellate Division and restored the judgment of the trial judge in the respondent's favour, as reported 47 Can. S. C. R. 622.

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D. L. McCarthy, K.C., and *E. F. Spence*, for the appellants. The respondent had no right to travel in the train with the horse save under the special contract. The document was handed to him as entitling him to do so, and he must have known that it contained the contract for his conveyance. He must be taken to have authorized Dr. Parker to make the contract for his conveyance and to limit his rights against the appellants. The appellants took reasonable steps to bring the condition to the notice both of Dr. Parker and of the respondent.

[They were stopped.]

Younger, K.C., and *T. H. Willes Chitty*, for the respondent. The respondent had a right to be carried safely, unless and so far as that right was limited by contract. He was not a party to the "livestock special contract" and is not bound by its terms. That contract was one between the consignor of the horse and the appellants; it contemplated a separate subsequent contract with the respondent. The respondent's right to sue in tort was not affected: *Martin* v. *Great Indian Peninsular Ry. Co.* (1); *Marshall* v. *York, Newcastle and Berwick Ry. Co.* (2); *Taylor* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3); *Jennings* v. *Grand Trunk Ry. Co.* (4) Even if the respondent knew that he was being carried under a contract made on his behalf, he was not bound by the special condition. Reasonable steps were not taken to bring it to his notice; knowledge to be imputed to Dr. Parker is not to be imputed to the respondent: *Richardson, Spence & Co.* v. *Rowntree* (5); *Henderson* v. *Stevenson* (6); *Parker* v. *South Eastern Ry. Co.* (7)

[LORD DUNEDIN referred to *Hall* v. *North Eastern Ry. Co.* (8)]

In that case the plaintiff himself took the ticket. The respondent was not offered the option to travel at the full fare; in order that the condition should be binding upon the passenger there must be a conscious choice on the part of the passenger: *Clarke* v. *West Ham Corporation.* (9) Further the Railway Board had

(1) (1867) L. R. 3 Ex. 9.
(2) (1851) 11 C. B. 655.
(3) [1895] 1 Q. B. 134.
(4) (1885) 15 Ont. App. 477.
(5) [1894] A. C. 217.
(6) (1875) L. R. 2 Sc. & D. 470.
(7) (1877) 2 C. P. D. 416.
(8) (1875) L. R. 10 Q. B 437.
(9) [1909] 2 K. B. 858.

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no power under the Railway Act of Canada to authorize the condition. Under s. 284, sub-s. 7, the respondent had a right of action and the appellants are precluded by that sub-section from relieving themselves from liability in the event of negligence. Under s. 340 the Railway Board can authorize a contract "impairing, restricting or limiting" a company's liability, but they cannot authorize a condition which wholly relieves the company from liability for negligence. [*Heller* v. *Grand Trunk Ry. Co.* (1) was also referred to.]

D. L. McCarthy, K.C., in reply referred to *Marriott* v. *Yeoman Brothers*. (2)

1915
April 20.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. The question raised in this appeal relates to the right of the respondent, who was plaintiff in an action in the High Court of Justice for Ontario, to recover damages against the appellants for injuries suffered by him in an accident on the appellants' railway. He was travelling in charge of a horse consigned under what is known as a "live-stock special contract," in a form authorized by the Railway Commissioners for Canada. The terms of the contract purported to relieve the appellants from liability for injuries arising from accident, even where caused by negligence, to a person travelling with the live stock, in case he had been permitted to travel at less than full fare.

The course of the litigation disclosed much difference of judicial opinion. The Court of first instance decided in favour of the respondent. The Court of Appeal for Ontario by a majority (Garrow, Maclaren, and Meredith JJ.A.) reversed this decision, Magee and Lennox JJ.A. dissenting. There was an appeal to the Supreme Court of Canada, and in that Court, by a majority (Davies, Idington, Duff, Anglin, and Brodeur JJ., the Chief Justice dissenting), the judgment of the Court of Appeal for Ontario was reversed. On an application for special leave to appeal to the King in Council this Board thought fit, in view of the importance of the question raised, to recommend that

(1) (1911) 25 Ont. L. R. 117. (1912) 25 Ont. L. R. 488.
(2) [1909] 2 K. B. 987.

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special leave should be given, but, in the circumstances, only on the terms that the appellants should, whatever the result of the appeal might be, pay the whole costs of this appeal as between solicitor and client.

Before adverting to the facts out of which the litigation arose it will be convenient to refer to certain provisions of the Railway Act of Canada. Apart from statute a carrier is liable in Canada, as in England, for injury arising from negligence in the execution of his contract to carry unless he has effectively stipulated that he shall be free from such liability. The freedom so to stipulate has been restricted in Canada by the Railway Act. Under s. 340 no contract restricting liability for carriage is to be valid unless it is of a kind approved by the Railway Board, which is empowered to determine the extent to which such liability may be impaired, restricted, or limited, and generally to prescribe by regulation the terms and conditions under which any traffic may be carried. Standard and special freight tariffs are to be filed with the Board and to be subject to its approval, and are to be published, and made open to the inspection of the public at the railway companies' stations and offices. Under the Act the companies are, by s. 284, put under a general obligation to carry and deliver with due care and diligence, and any one aggrieved by a breach of this duty is to have a right of action, from which the companies are not to be relieved by any notice, condition, or declaration if the damage arises from negligence or omission. It is, however, to be observed that this right is expressed by the section to be given "subject to this Act." Their Lordships think that where, under s. 340 and the other sections which deal with special tariffs, forms of stipulation limiting liability have been approved by the Board, and the conditions for making them binding have been duly complied with, the companies are enabled in such cases to contract for complete freedom from liability for negligence.

In 1904 the Board approved a form of livestock special contract, and the order approving it was duly published. The appellants adopted this form, and, so far as appears, have complied with the conditions prescribed for its use. It is out of a contract in the approved form that the present question arises.

The facts of the case are shortly as follows: The respondent lives in the town of South River, in Ontario. He undertook to Dr. McCombe, who resides in that town, to go to Milverton and bring back a horse by rail from there. Dr. McCombe had arranged with Dr. Parker, of Milverton, to buy the horse for him. When the respondent arrived at Milverton he went with Dr. Parker to see the horse, and it was thereafter brought to the appellants' siding to be put on one of their cars under arrangements made by Dr. Parker with their local agent. The respondent and Dr. Parker placed the horse in the car. Dr. Parker had originally been under the impression that the horse could travel without any one accompanying it, but he had been informed by the agent that, for a long journey, it must be accompanied by some one. Arrangements had therefore to be made between Dr. McCombe, Dr. Parker, and the respondent for the latter to travel with the horse. After putting it on the train Dr. Parker went with the respondent to the agent's office, and Dr. Parker and the agent signed a contract in the presence of the respondent. Dr. Parker folded it up and said he should send it to Dr. McCombe by mail, but the agent told him in the respondent's hearing to give it to the latter to carry with him as it showed that he was travelling with the horse. The document was accepted by Dr. Parker, but he did not think it necessary to take the trouble of reading it through. The respondent himself did not read it, but simply put it in his pocket, where it remained till some time after the accident, when he gave it to Dr. McCombe. The officials on the train appear to have recognized the respondent, who looked after the horse, as the person travelling with it. He was not asked for any ticket or fare. In the course of the journey there was a collision due to the negligence of the appellants' servants and the respondent was injured.

The case was heard before Latchford J. and a jury. There was no dispute as to the negligence, and the only question left to the jury was the amount of the damages. These the verdict assessed at 3000 dollars. The learned judge afterwards gave judgment for the respondent. In order to appreciate the significance of what he decided it is necessary to turn to the terms of the special contract. This, as has already been stated,

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was substantially in the form prescribed by the Railway Board. It was expressed to be made between the appellants and Dr. Parker. It acknowledged the receipt from him of a horse, which the appellants undertook to transport to South River on the terms that their liability in respect of the horse should be restricted to a specified amount, in consideration of a rate lower than the full rate being agreed on. It went on to provide, as one of the stipulations on its face, that, in case the appellants should grant to the shipper, or any nominee of the shipper, a pass or privilege at less than full fare to ride in the train on which the horse was being carried, for the purpose of taking care of it while in transit and at the owner's risk as before mentioned, then, as to every person so travelling on such pass or reduced fare, the appellants were to be entirely free from liability in respect of his death, injury, or damage, whether it was caused by the negligence of the appellants, or their servants, employees, or otherwise howsoever. The contract concluded with a declaration, signed by Dr. Parker as shipper, that he fully understood its meaning. Across it was printed, in red ink, "Read this special contract." On the margin was put, "Pass man in charge half fare." The document thus contained the authority to travel for the man as well as the horse. The practice was for the railway companies in such cases to obtain payment from the consignee on delivery, and Dr. McCombe some days subsequently paid the appellants the amount of the freight, including the half fare for the respondent.

These being the material facts, the learned judge held that the respondent was not debarred from what he called his common law right. Any other view, he said, appeared to him to imply that by a contract to which he was not a party, and of the terms of which he had no knowledge, his right to be carried without negligence was taken away. The Court of Appeal for Ontario by a majority reversed this judgment, on the ground that a contract excluding liability even for negligence had been made and was binding on the respondent. Their judgment was, however, overruled by a majority in the Supreme Court of Canada, who held that although the language of the contract purported to exempt the appellants from their liability, it did not contain the

real terms on which the respondent travelled in the train which met with the accident.

It is obvious that the question on which this appeal turns is one as to the terms on which the respondent was accepted by the appellants as a passenger.

There are some principles of general application which it is necessary to bear in mind in approaching the consideration of this question. If a passenger has entered a train on a mere invitation or permission from a railway company without more, and he receives injury in an accident caused by the negligence of its servants, the company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract, or of a duty imposed by the general law, and in the latter case as in form a tort. But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in England in different ways, be superseded by a specific contract, which may either enlarge, diminish, or exclude it. If the law authorizes it, such a contract cannot be pronounced to be unreasonable by a Court of justice. The specific contract, with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him.

A second proposition is that if the contract is one which deprives the passenger of the benefit of a duty of care which he is prima facie entitled to expect that the company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms imposed. This he may be shown to have done either in person or through the agency of another. Such agency will be held to have been established when he is shown to have authorized antecedently or by way of ratification the making of the contract under circumstances in which he must be taken to have left everything to his agent. In such a case it is sufficient to prove that he has been content to accept the risk of allowing terms to be made without taking the trouble to learn what was being agreed to.

The company may infer his intention from his conduct. If he stands by under such circumstances that it will naturally

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conclude that he has left the negotiation to the person who is acting for him, and intends that the latter should arrange the terms on which he is to be conveyed, he will be precluded by so doing from afterwards alleging want of authority to make any such terms as the law allows. Moreover, if the person acting on his behalf has himself not taken the trouble to read the terms of the contract proposed by the company in the ticket or pass offered, and yet knew that there was something written or printed on it which might contain conditions, it is not the company that will suffer by the agent's want of care. The agent will, in the absence of something misleading done by his company, be bound, and his principal will be bound through him. To hold otherwise would be to depart from the general principles of necessity recognized in other business transactions, and to render it impracticable for railway companies to make arrangements for travellers and consignors without delay and inconvenience to those who deal with them.

In a case to which these principles apply, it cannot be accurate to speak, as did the learned judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger is simply that which the contract has defined.

Applying these principles to the facts of the present case, what is the construction to be put upon them by a Court of justice? It may well be that the respondent did not actually know the latitude allowed by the law of Canada to railway companies. It is highly probable that he did not think of any such question as has arisen. But he must have known that he required to obtain permission from the company in order to travel with the horse, and for the rest, the law imputes to him the duty of knowing its principles. He had taken a single ticket only when he came to Milverton.

The proper inference appears to be that when he and Dr. Parker had put the horse into the train, he went with Dr. Parker to the agent's office with the intention that Dr. Parker should make, as regards both the horse and himself, the whole of the necessary arrangements at the office. If Dr. Parker had been acting for himself, there can be no doubt that he would have been bound by the terms of the document he received from the agent and by his signature expressly told the company that he understood. Can the respondent be in a better position? On the evidence, can he say that the company's agent was not led by him to believe that Dr. Parker, by whose side he stood while the contract was being made, was making it with his assent? "I was standing right there," he says in his cross-examination, "alongside Dr. Parker."

"Q. What did Dr. Parker say after he had signed the contract? —A. He folded the contract up and said he would send that to Dr. McCombe by mail, and 'it will be there before you will be there,' and he says, 'No, you must give it to this man, he must carry it with him, and it shows that he is travelling with this car.' They just handed it to me and I put it in my pocket."

Under such circumstances the true inference is that the respondent accepted the document knowing that it contained the contract obtained by Dr. Parker for his journey, and in accepting it accepted all the terms which were set out on the face of the document, and which he would have seen had he taken the trouble to look at what was handed to him. It does not appear possible to say, in this case, that he was misled in any way, or that the agent need have done more than he did when he handed over a document which set out the terms offered for acceptance with great distinctness, in the form which the Railway Board had directed.

Such view is not inconsistent with any finding of fact by the jury, or even by the learned judge who tried the case. It is based on the legal consequences which flow from facts about which there is no controversy. The majority in the Court of Appeal for Ontario appear to have interpreted these consequences in the only way which the law warrants.

Having regard to the conclusions at which their Lordships

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have thus arrived, they will humbly advise His Majesty that the appeal should be allowed, and the action dismissed with costs in all the Courts below. The appellants must, however, under the terms on which special leave to appeal was given, pay the whole of the costs of the appeal to the King in Council as between solicitor and client.

Solicitors for appellants: *Batten, Proffitt & Scott.*
Solicitors for respondent: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1915 *March* 16, 18, 19; *April* 27.

THE EASTERN TRUST COMPANY . . . APPELLANTS;

AND

McKENZIE, MANN & CO., LIMITED . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Contract—Construction—Jurisdiction of Court—Duty of Executive to ascertain Law—Injunction against receiving Money—Payment by Executive—Contempt of Court.

Where the Crown cannot be sued, either by petition of right, or through an appointed officer, it is the duty of the Executive, in cases of doubt, to ascertain the law by application to the Court in order to act in accordance with it.

The respondents agreed to pay 195,000 dollars as part of the purchase price for all the stock and bonds of a company owning a partly constructed railway in Nova Scotia. The contract provided that the Government of Nova Scotia had the right to be satisfied that all claims for labour and supplies furnished in connection with the construction of the railway had been paid, and that the amount of those claims might be paid out of the subsidies payable by the Government, and that all sums paid in liquidation of such claims should be considered as payments on account of the 195,000 dollars:—

Held, that the contract did not oust the jurisdiction of the Court to determine whether a payment by the Government out of the subsidies was in respect of "labour and supplies" within the meaning of the contract.

Held, further, that a receipt from the Government of money which the recipient has been restrained from receiving is a contempt of Court.

APPEAL by special leave from a judgment of the Supreme Court of Canada (May 14, 1914) reversing a judgment of the Supreme

* *Present:* VISCOUNT HALDANE L.C., LORD ATKINSON, LORD PARMOOR, SIR GEORGE FARWELL, and SIR ARTHUR CHANNELL.

Court of Nova Scotia (July 5, 1913) which varied the report of the referee appointed by the Court in a partnership action.

The appeal arose out of a partnership action in which James Irvine, since deceased, claimed an account of the partnership dealings between himself and the defendants R. G. Hervey and the Hervey Trust and Guarantee Company, Limited. The appellant company was the receiver appointed in the action.

On June 13, 1902, the respondents had entered into a contract with the Hervey Trust and Guarantee Company, Limited, on behalf of the partnership, whereby the respondents agreed to pay to that company 195,000 dollars in consideration of the transfer to them of the bonds and stock of the Nova Scotia Southern Railway Company.

The question at issue in the appeal was whether, on the true construction of a provision of that contract, the respondents were entitled to treat as payments on account of the 195,000 dollars certain payments made by the Government of Nova Scotia to the amount of 66,000 dollars. The provision, under which the respondents contended that they were so entitled, was as follows: "It is part of this contract that the Government of Nova Scotia have the right to be satisfied that all claims for moneys due and owing by the said Nova Scotia Southern Railway Company, Limited, and its contractors in the Province of Nova Scotia, for labour and supplies furnished in connection with the construction of the said Nova Scotia Southern Railway Company's road heretofore constructed, have been paid or satisfied, and the amount of such claims may be paid out of the consideration moneys hereinbefore mentioned, and all sums paid in liquidation of such claims shall be and be considered payments on account of said sum of 195,000 dollars above mentioned."

The partnership action came on for hearing before Graham J. on January 29, 1904, when the appellant company was appointed receiver, and R. G. Hervey and the Hervey Trust and Guarantee Company, Limited, were restrained from receiving the sums due under the agreement. On March 13, 1905, a reference was directed for the purpose of taking the accounts.

The Government of Nova Scotia, under circumstances referred to in the judgment, had made large payments out of the subsidies

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(the consideration moneys referred to in the contract) in respect of claims against the railway company. Part of these payments were made to Hervey after he had been restrained as above stated. The facts fully appear from their Lordships' judgment. The referee by his report gave credit to the respondents for the entire sum paid by the Government.

The Supreme Court of Nova Scotia (Sir C. Townshend C.J., Russell and Ritchie JJ.) varied the report by disallowing sums amounting to 66,000 dollars, including the payment to Hervey. The judgment of the Court was delivered by Ritchie J., who expressed the opinion that in view of the injunction the payment to Hervey was illegal; that upon its true construction the contract did not give to the Government the right to decide what claims were for "labour and supplies"; and that the majority of the payments did not come within that category.

The Supreme Court of Canada (Sir C. Fitzpatrick C.J., Idington, Anglin, and Brodeur JJ., Duff J. dissenting) reversed the above decision. The majority were of opinion that the Government was entitled to decide, as between the respondents and the appellants, what sums were due for "labour and supplies," and that it must be presumed to have decided that the sums paid were so due. Duff J., in dissenting, was of opinion that the appellants were entitled to receive 195,000 dollars less such sums as the Government had paid in discharge of claims which were for "labour and supplies" within the meaning of the contract and which the Government was satisfied were due and owing.

Sir R. Finlay, K.C., T. S. Rogers, K.C., and *Geoffrey Lawrence*, for the appellants. The contract of June 13, 1902, does not oust the jurisdiction of the Court to determine what are claims for "labour and supplies" within its meaning. The sums disallowed by the Supreme Court of Nova Scotia were not for "labour and supplies." Upon the true construction of the contract "labour" means manual labour and does not include payments to contractors or sub-contractors; "supplies" means materials provided for construction work. Although the Government was not restrained by the injunction, Hervey was

restrained from receiving the payment made to him; the payment to him was illegal and cannot be deducted from the 195,000 dollars.

P. O. Lawrence, K.C., H. Mellish, K.C., and *Tyrrell Paine*, for the respondents. The plaintiff in the action claimed that the 195,000 dollars was payable out of the subsidies, and that the money in the hands of the Government were partnership assets. Upon this basis the receiver was appointed. The respondents cannot be charged with any faulty administration of this appropriated fund over which they had no control. The appellants are estopped from denying that the money was payable out of the subsidies in the Government's hands, and there has been a novation. In construing "labour and supplies furnished" the last word must govern both "labour" and "supplies"; the claims payable included claims by contractors who had furnished labour: *Young* v. *The Orpheus*. (1) Under the purchase contract the respondents were entitled to have all the debts of the railway discharged by the partnership. If the money now in dispute had been paid to the appellants they would have had to pay the very claims in satisfaction of which the moneys were applied.

Geoffrey Lawrence replied.

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The judgment of their Lordships was delivered by

SIR GEORGE FARWELL. This is an appeal from a judgment of the Supreme Court of Canada (Duff J. dissenting) which reversed the unanimous judgment of the Supreme Court of Nova Scotia, dated July 5, 1913, varying the report dated January 15, 1912, of the referee appointed by the Court in this action. The action is a partnership action between James Irvine, since deceased, as plaintiff, and Robert G. Hervey and others as defendants, and a decree was made therein by Graham J. on March 13, 1905, whereby the partnership was dissolved and certain accounts and inquiries were directed to be taken by a referee appointed by the Court. The respondents, McKenzie, Mann & Co., were made parties to the action under the following circumstances. In June, 1902, the Hervey Trust

(1) (1875) 119 Mass. 179.

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and Guarantee Company, as agent for the partners Irvine and R. G. Hervey, controlled all the capital, stock, and bonds of the Nova Scotia Southern Railway Company, which had been formed by the partners, who were unable to complete its construction, and arrangements had been made whereby the railway was to be completed by the Halifax and South-Western Railway Company, and Government subsidies were to be paid to that company in respect of the Nova Scotia line, which would form part of the said Halifax and South-Western Railway when completed; and on June 13, 1902, an agreement was entered into between the trust company, as agents for the two partners of the one part, and the respondents (therein and hereinafter called the contractors) of the other part, whereby the partners agreed to sell and the contractors agreed to buy all the stock and bonds of the said Nova Scotia Railway Company for 275,000 dollars, of which 75,000 dollars was to be paid in fully-paid capital stock of the said Halifax Company at par on an event which has happened and the balance, 200,000 dollars, as follows: 5000 dollars on execution and the balance, 195,000 dollars, from time to time to the extent of 50 per cent. of the amounts paid by Government on account of loans or subsidies in respect of the said Nova Scotia line as and when such amounts are paid until the whole 195,000 dollars is paid, "provided that if the 50 per cent. be not sufficient to pay the 195,000 dollars in full, the balance shall be paid when the said loans and subsidies have been all received by the said company." There is a further proviso which will be more conveniently dealt with later.

The sum payable by the contractors would form part of the assets of the partnership of which the Court had undertaken the administration, and would be primarily applicable in discharging the debts of the firm, including its indebtedness to the Nova Scotia Company, and inasmuch as the contractors owned all the stock and shares of that company, the discharge of the company's debts would enure for their benefit by increasing the value of the company's assets, and consequently of its stocks, shares, and securities. The substantial question in the case is the amount payable under the contract by the contractors.

On January 29, 1904, a receiver was appointed of the partnership assets, and an injunction was granted restraining the defendants Hervey and the Hervey Trust Company from receiving from the contractors or the Provincial Treasurer of the Province all or any part of the 195,000 dollars.

When this appeal was opened before their Lordships it was treated as common ground that (as appears from the report of the referee) by September 27, 1907, the total subsidy then paid by Government was 397,080.90 dollars: "One half of this, 198,540.45 dollars, a sum sufficient to pay more than the amount called for under the contract of June 13, 1902."

This subsidy was paid on mileage. The inquiry with regard to this matter is given in the order of November 24, 1908: "What balance remains due and owing in respect of the consideration moneys payable under the said contract dated June 13, 1902, to the parties entitled under the said agreement, or the persons, if any, who succeeded to their rights thereunder."

The case has throughout proceeded on the footing of ascertaining the exact amount due, but towards the end of his reply before their Lordships counsel for the respondents took the point that nothing was due, because, according to his argument, the 195,000 dollars fell short by about 30,000 dollars, and that the inquiry should be answered accordingly. It may be questioned whether such an argument is now open to the respondents, but whether it is so or not, their Lordships are of opinion that it is untenable; the 5000 dollars was undoubtedly payable and paid on the execution of the contract, and the balance from time to time to the extent of 50 per cent. of the amounts payable and paid by Government on account of loans or subsidies. There is nothing to lend colour to the suggestion that the contractors are not bound to pay until the whole accounts have been settled up, and show no balance, even of a dollar, owing. The proviso points to the payment of the balance out of subsidies paid in respect of the residue over and above the 50 per cent., not to the payment of the entirety of the 50 per cent. of the subsidies, as a condition precedent to a demand for payment of so much as has been paid, and an account of the amount of such payments.

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Another objection was also taken by the respondents' counsel, which may possibly have been taken in the Supreme Court of Canada, although the only reference to anything of the sort occurs in Duff J.'s dissenting judgment, where he says: "If it had been shown that the plaintiff in the action or the receiver was aware that such payments were being made to Hervey, then it is conceivable that a case of estoppel might have been made out. But there is no suggestion of anything of the kind."

The argument offered to their Lordships is that Hervey, in contempt of Court, got payment of some of the subsidy money to himself, and that a motion to commit him was made, which failed by reason of his disappearance from the Colony. It appears to their Lordships that it is sufficient to state the point to show its want of substance.

The real point, however, argued and dealt with in the Courts below is as follows. The contract of June 13, 1902, contained the following proviso referred to above: "It is part of this contract that the Government of Nova Scotia have the right to be satisfied that all claims for moneys due and owing by the said Nova Scotia Southern Railway Company, Limited, and its contractors in the Province of Nova Scotia for labour and supplies furnished in connection with the construction of the said Nova Scotia Southern Railway Company's road, heretofore constructed, have been paid or satisfied, and the amounts of such claims may be paid out of the consideration moneys hereinbefore mentioned, and all sums paid in liquidation of such claims shall be considered payments on account of the said sum of 195,000 dollars."

The object of this proviso is to enable the Government of Nova Scotia, in whose jurisdiction labour had been done by working men, and materials supplied and used, on that portion of the railway that had been made in the Province, to compel payment therefor by the Nova Scotia Railway and its contractors: the persons to be paid are the labourers for their labour and the tradesmen for their goods: the persons who were bound to pay, and whose default was to be cured by Government intervention, were the railway company and the

contractors. There is no such provision with regard to any other work or material.

The contract is framed in accordance with the subsidy contract between the Nova Scotia Government and the Halifax and South-Western Railway Company, in whom the undertaking of the Nova Scotia Company was vested (c. 3 of the Statutes of Nova Scotia for 1903). The subsidy contract, which was confirmed by c. 1 of the Statutes of Nova Scotia for 1902, makes special provision for payment of all labour in the construction of the work or materials therefor, and in case of default in paying the men or in paying for materials on or before the 20th day of the month for all work performed or materials delivered before the first of that month, the Governor in Council has power to retain all money due to the company and to apply it in paying the men their wages, or in paying for materials, and charge it as if paid to the company on account of the subsidy. The Government undertook no personal liability for such payment, but took power to ascertain the sums due and the persons to whom they were due.

In June, 1903, the Government, under the statutory powers given under c. 26 of the Statutes of Nova Scotia for 1903, appointed a Commissioner "to inquire into and report to the Governor in Council what claims for wages of the workmen employed in and for materials supplied for the construction or unfinished construction of the Nova Scotia Southern Railway are due and unpaid by any person, firm, or corporation, and the particulars and amounts of such claims respectively, and also all other claims against the company, construction company, or contractors engaged in the building of the said railway, the nature and particulars of the said claims, and the respective amounts thereof."

The Commissioner duly made his report, and the Government acted thereon, and made large payments to persons reported as entitled to payments out of the subsidy. The greater part of these payments reached the persons entitled thereto, and no objection is now raised in respect thereof. But before all the payments on account of the subsidy had been made, namely, on July 13, 1902, this action was commenced, and a receiver was

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appointed by the Court of the assets of the plaintiff's business, and an injunction was granted until the final determination of the action restraining the defendants R. G. Hervey and the Hervey Trust from receiving from the Canadian Bank, or the contractors, or the Provincial Treasurer of Nova Scotia or otherwise, and the said bank and the contractors were restrained from paying to the said defendants or to any persons other than the receiver (inter alia), all or any part of the said 195,000 dollars. The Provincial Treasurer was dismissed from the action on the ground that the Court had no jurisdiction over him, and the Government, with full notice of the order, proceeded to distribute the subsidy without any regard to it. With regard to payments actually made by the Government under the statutory powers above referred to, the action of the Executive may be justifiable; but even so, the question whether any particular sums mentioned in the contract were or were not properly described as for labour and supplies is a question of construction, and therefore of law for the Courts. Their Lordships are unable to agree with the view of the Supreme Court as to the powers of the Government and to the presumption that ought to be drawn as to the nature of the payments made.

It was further held, on the admission of the parties, that no injunction could be granted against the Crown, and further that no other party to the action was bound by the injunction or the appointment of a receiver.

This decision raises a question of great importance. Duff J., in his dissenting judgment, puts the first point very clearly: "The parties were declaring that certain payments made by the Government were to be deducted from the consideration moneys. These were such payments as the Government should be satisfied were due and owing in respect of claims for 'labour and supplies.' The deduction could 'only be made if two conditions were satisfied: (1.) that the claim was for labour and supplies; and (2.) that the Government was satisfied that it was due and owing.'"

In the present case the Government have not only made payments which by no latitude of construction can come within the words "labour and supplies," but have also paid a large sum to

R. G. Hervey, who was directly restrained by the Court from receiving it. If it was the case of a private individual, he would be clearly liable to make good the wrongful payment and to purge his contempt. In the case of the Crown there is no ground for Idington J.'s proposition that the Government may fairly say that they were given such power by the Legislature over the subject-matter and that the Courts have no ground for interfering at all, directly or indirectly, with the exercise of such a discretion. There is nothing on which to found the existence of the alleged discretion or to support a decision which pronounces the Executive Government free to dispose of money the right to which is sub judice inter partes and held in medio by the order of the Court.

The second point taken by Idington J. is equally untenable and even more important. The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorize the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General, and a declaratory order obtained, as has been recently explained by the Court of Appeal in England in *Dyson* v. *Attorney-General* (1) and in *Burghes* v. *Attorney-General.* (2) It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it. The proper course in the present case would have been either to apply to the Court to determine the question of construction of the contract, and to pay accordingly, or to pay the whole amount over to the receiver and to obtain from the Court an order on the receiver to pay the sums properly payable for labour and supplies, as to the construction of which their Lordships agree with the Supreme Court of Nova Scotia.

(1) [1911] 1 K. B. 410. (2) [1912] 1 Ch. 173.

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The duty of the Crown in such a case is well stated by Lord Abinger in *Deare* v. *Attorney-General.*(1) After pointing out that the Crown always appears (in England) by the Attorney-General in a Court of justice, especially in a Court of Equity, where the interest of the Crown is concerned, even perhaps in a bill for discovery, he goes on to say: "It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of justice where any real point of difficulty that requires judicial decision has occurred."

Further, their Lordships are unable to agree with the Supreme Court of Canada in their opinion of the injunction. Apart from the Crown, the Court had clear jurisdiction over all the parties to the action to restrain them from doing any of the acts complained of; its order and injunction operate in personam, and compel the party forbidden to do any act, whether the receipt of money or the like, to refrain from doingit, whoever the other party may be, and whatever his rights may ultimately prove to be. The existence of such a jurisdiction has been part of the equitable jurisdiction of our Courts for centuries, and is necessary in a case like the present for the safe preservation of the subject-matter of the action until the rights of the parties can be finally determined. It is a misconception to speak of the order and injunction of the Court in such a case as this as only permissive; the injunction was, of course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged, and although it could not bind the Government not to pay or make the Government responsible for that obedience to the law which the Court was entitled to expect, the man who received in breach of the order was guilty of a contempt in no way cured by the payment by the Government. Their Lordships are unable to agree with the decision of the Supreme Court which gives the Executive power to override the judgment of the Court.

Their Lordships, with all respect, differ entirely from the statements in Idington J.'s judgment, that an injunction under which the hand giving may be innocent, and the hand receiving

(1) (1835) 1 Y. & C. 197, at p. 208.

guilty, would be an anomaly not in accord with the policy of the law which developed the power of injunction. Such an injunction is, on the contrary, in accordance with ordinary practice and well-settled principles, and their Lordships are of opinion that the order to attach Hervey for contempt was rightly and properly made. An injunction, although subsequently discharged because the plaintiff's case failed, must be obeyed while it lasts; it is clear that if a claimant to an inalienable Government pension succeeded in persuading the Court in this country that he had a prima facie claim to it, and obtained an interim injunction, the true owner of the pension could be committed for contempt if he received his money in defiance of the order, although the Crown was no party to the litigation, and paid in disregard or ignorance of the order.

Their Lordships agree with the decision of the Supreme Court of Nova Scotia, and will humbly advise His Majesty to allow this appeal, discharge the order of the Supreme Court of Canada, and restore that of the Supreme Court of Nova Scotia of July 5, 1913.

But in remitting the report as directed by the last-mentioned order there should be a direction to the referee that in taking the accounts all amounts paid by the Government of Nova Scotia to the creditors of the Nova Scotia Southern Railway Company ought to be set off against the amount payable by the respondents.

The respondents must pay all the costs in the Courts below and of this appeal.

Solicitors for appellants: *Paines, Blyth & Huxtable.*
Solicitors for respondents: *Linklater, Addison & Brown.*

[HOUSE OF LORDS.]

H. L. (E.)* 1915 March 26.

LONDON COUNTY COUNCIL . . . . . APPELLANTS;

AND

ASSESSMENT COMMITTEE OF THE METROPOLITAN BOROUGH OF ISLINGTON . . . . . RESPONDENTS.

Rating—Metropolis—Reduction in Rateable Value—Provisional List—Refusal of Assessment Committee to appoint Valuer — Mandamus — Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 47, *sub-ss.* 2 *and* 6.

By the Valuation (Metropolis) Act, 1869, s. 47, if in the course of any year the value of any hereditament is from any cause increased or reduced in value, (sub-s. 1) the overseers of the parish in which such hereditament is situate, on the written requisition of the assessment committee or of any ratepayer of the union or of the surveyor of taxes for the district, shall send to the assessment committee "a provisional list containing the gross and rateable value as so increased or reduced of such hereditament"; and (sub-s. 2) if the overseers, within the time therein specified, make default in sending such provisional list the assessment committee shall appoint a person to make such provisional list. By sub-s. 4 objection may be made to such provisional list by the occupier or by the surveyor of taxes, and by sub-s. 6 the committee shall hear and determine on the objection:—

Held, (1.) (reversing the decision of the Court of Appeal) that the increase or reduction in value contemplated by the section ought to be treated as a condition precedent to the ultimate modification of the quinquennial valuation, and not as a condition precedent to the preliminary steps necessary for the constitution of the tribunal entrusted with the duty of deciding whether and to what extent the quinquennial list is to be modified; that consequently the duty of the overseers to prepare a provisional list on the written requisition of a ratepayer is purely ministerial, and the duty of the assessment committee (in case of default by the overseers) to appoint a person to make a provisional list is also purely ministerial, and that the requisition can be refused only if it is made in bad faith or is frivolous; but that such provisional list need not show any increase or reduction in value, if in the opinion of the person making the list there is no alteration in fact: (2.) (affirming the decision) that the comparison of values is to be made with the

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* *Present:* VISCOUNT HALDANE L.C., LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

state of facts existing at the time of the quinquennial list for the time being in force and not with the state of facts existing at the commencement of the year in question.

Decision of the Court of Appeal [1914] 3 K. B. 481 reversed.

APPEAL from an order of the Court of Appeal reversing an order of a Divisional Court. (1)

In the quinquennial valuation list in force in the parish of Islington at all material times that portion of the appellants' tramways undertaking which was situate in that parish was assessed as follows :—

Description of Property.	Name or Situation of Property.	Gross Value.	Rateable Value.
Tramways . . .	Within the borough	£ 57,330	£ 36,030
Do.	Highgate Hill		
Car sheds, generation station, stores, offices, etc.	Pemberton Gardens		
Power station . . .	Camden Road		
Do.	Upper Street		
Do.	Woodville Road		

On April 4, 1913, the appellants served on the Borough Council of Islington, acting as overseers of the parish, a requisition requiring them to send forthwith to the respondents, the assessment committee of the borough, a provisional valuation list for the parish containing this portion of the appellants' tramway undertaking, on the ground that the said hereditament had been reduced in value within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869 (2), in consequence of the falling off of the

(1) [1914] 3 K. B. 481.

(2) Valuation (Metropolis) Act, 1869, s. 47: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect:

"(1.) The overseers of the parish in which such hereditament is situate may, and on the written requisition of the assessment committee or of any ratepayer of the union or of the surveyor of taxes for the district shall, send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament:

"(2.) A copy of the requisition shall be sent by the person making it to the clerk of the assessment committee, and if within fourteen days after the requisition has been served

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receipts from the tramway undertaking due (among other things) to competition from motor omnibuses; and the appellants required to have the gross and rateable values appearing in the valuation list then in force reduced to 1*l.* and 1*l.* respectively. On April 16, 1913, the overseers declined to accede to this requisition. On May 3 Mr. Tanner, the appellants' solicitor, wrote to Mr. Dewey, who was the town clerk and also clerk to the assessment committee (the respondents), and gave particulars of the traffic returns and the number of car miles run in respect of the Islington portion of the appellants' tramway undertaking for the half-years ending September 30, 1911, and September 30, 1912. He went on to state that the apportioned figures for each borough for the half-years ending March 31, 1912 and 1913, were not yet available, but he gave the figures for the whole undertaking for the four half-years ending September 30, 1911, March 31, 1912, September 30, 1912, and March 31, 1913, and stated that the estimated surplus carried to net revenue account for the whole undertaking for the year 1912-13 as compared with the surplus for the year 1911-12 showed a decrease of 191,659*l.* In view of the above information he requested the borough council to make a provisional list at a reduced amount in respect of the appellants' tramways in the borough. Mr. Dewey in reply stated that he had submitted the appellants' requisition to the assessment committee, who desired further information on the point whether the reduction in value of the undertaking was attributable to the competition of motor omnibuses. In answer to this request the appellants on several occasions gave further particulars of the traffic returns to Mr. W. H. Eve, surveyor and rating valuer, who had been retained to advise the respondents in respect of the requisition. These particulars are sufficiently stated in the summary of the evidence given below. On June 26, 1913, and again on July 16, 1913, Mr. Tanner wrote to Mr. Dewey requiring the respondents to

on the overseers they make default in sending such provisional list he shall forthwith summon the assessment committee, and the assessment committee shall appoint a person to make such provisional list, in the same manner as is in this Act provided in the case of the overseers failing to transmit a valuation list;"

appoint a person to make a provisional list in respect of the appellants' tramways in the borough in accordance with s. 47, sub-s. 2, of the Valuation (Metropolis) Act, 1869. On July 16 Mr. Dewey replied:—

"Valuation of Property (Metropolis) Act, 1869.

"London County Council Tramways.

"Referring to the correspondence which has taken place between us with regard to the council's request that my assessment committee should appoint a person to make a provisional valuation list in consequence of a reduction in value in the council's tramways alleged to have taken place within the meaning of sect. 47 of the above Act, I have now to inform you that my committee, having fully considered and taken advice upon the matter, have come to the conclusion that there is no prima facie evidence of such a reduction as is contemplated by the section, and therefore decline to accede to the council's request."

Thereupon the appellants applied for a mandamus commanding the respondents to make a provisional list in accordance with their requisition. In support of this application the appellants filed affidavits by Mr. Tanner, Mr. Fell, their chief officer of tramways, and Mr. Bird, their deputy clerk. Mr. Bird deposed that in the years 1912 and 1913 the business done upon the Islington portion of the appellants' tramway undertaking had suffered a serious diminution due mainly to the competition of motor omnibuses, and in support of this contention he stated that the number of car miles run and the gross receipts earned by the tramways situate within the parish during the period in question were as follows:—

Half-year ending	Total gross receipts.	Car miles run.	Gross receipts per car mile.
30th September, 1911	£104,974	2,206,521	11·42*d.*
31st March, 1912	£102,645	2,216,982	11·11*d.*
30th September, 1912	£98,329	2,230,881	10·58*d.*
31st March, 1913	£89,989	2,386,169	9·05*d.*

He also stated his belief that the diminution in business shown by these figures constituted an alteration of a permanent

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and substantial character in the Islington portion of the undertaking.

The respondents in opposition to the application filed two affidavits by Mr. Eve. Mr. Eve in his first affidavit gave the following table of figures showing the number of car miles run and the gross receipts earned in respect of the Islington tramways for the preceding four years.

	1909-10.	1910-11. (estimated)	1911-12.	1912-13. (estimated)
Car miles ...	3,747,605	4,231,986	4,423,503	4,973,550
Receipts—	£	£	£	£
Traffic ...	182,103	200,335	207,619	197,857
Advertisements	2,186	2,468	2,211	2,272
	184,289	202,803	209,830	200,129

This table he stated was compiled from figures supplied by the appellants. He also stated in reference to this table that the receipts for the years 1910-11, 1911-12, showed a considerable increase over the receipts for the year in respect of which the quinquennial valuation list was prepared, namely, that ending on March 31, 1910; that no increased assessment of the hereditament was made by the respondents either because of such increased receipts, or because of the increased value of the hereditament due to the alteration in many parts of Islington of the appellants' tramway lines from horse to electric traction; and that the receipts for the year ending March 31, 1913, were considerably greater than those for year 1909-10 upon which the quinquennial list was based. He further stated his belief that the diminution of the receipts for the year ending March 31, 1913, was a mere fluctuation due in part to the weather and would be recovered by reason of the opening of new lines, the making of working arrangements with other tramway owners, and the increased frequency of tramway services. In his second affidavit Mr. Eve gave a further table of figures showing the net receipts of the tramways in Islington for the preceding four years as follows:

1909-10.	1910-11.	1911-12.	1912-13
£76,529.	£83,035.	£86,535.	£76,489.

The evidence is fully set out in the report of the case in the Courts below, but for the purposes of the present appeal the above summary is sufficient.

On July 30, 1913, a Divisional Court consisting of Ridley, Pickford, and Atkin JJ. granted an order nisi for a writ of mandamus commanding the respondents to appoint a person to make a provisional valuation list for the parish of Islington pursuant to s. 47, sub-s. 2, of the Valuation (Metropolis) Act, 1869, containing the gross and rateable values of the portion of the tramways of the appellants within the said parish "as reduced since the making of the valuation list in force in the said parish" on the ground that the said values had been reduced within the meaning of the said section by reason of the competition of motor omnibuses.

On November 28, 1913, the respondents showed cause against this order, and on December 2 a Divisional Court consisting of Bray and Lush JJ. made an order for the issue of a peremptory writ of mandamus in the terms above stated, the defendants to pay the costs of the motion and of the issuing of the writ.

An application to stay the operation of the writ pending an appeal to the Court of Appeal having been refused, the respondents, on December 10, 1913, appointed Mr. Eve to make a provisional valuation list in accordance with the order of December 2. On December 20 Mr. Eve made a provisional list by which the gross and rateable values of the said hereditament were in each case reduced by 1*l.* below the values appearing in the quinquennial list. He added a note that in his opinion there had been no reduction in the values, but that in order to comply with the intention of the order of December 2 he had reduced them by 1*l.*

The Court of Appeal by a majority (Kennedy and Swinfen Eady L.JJ., Vaughan Williams L.J. dissenting) set aside the order of the Divisional Court and the writ of mandamus and the valuation made pursuant thereto.

1915. Feb. 12, 16, 22. *Walter Ryde, K.C.*, and *Konstam*, for the appellants. 1. The appellants have made out a prima

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facie case of reduction in value within s. 47 of the Valuation (Metropolis) Act, 1869, by reason of the loss of traffic arising from the competition of motor omnibuses, and where a prima facie case is made out it is the duty of the assessment committee to appoint a person to make a valuation list. The section cannot mean that the committee may decide against a ratepayer who shows substantial grounds for his application without hearing him and without his being allowed to go to the Court. Mandamus is the only remedy in this case because no appeal is given by the Act against a refusal to appoint a person to make a valuation list.

2. In ascertaining whether there has been a reduction in value of the tramways in the course of the year 1912-13 within the meaning of the section the comparison is to be made with the immediately preceding year, and not, as the respondents contend, with the year upon which the quinquennial valuation is based, for by s. 45 the quinquennial valuation list for the time being in force must be assumed to be correct for each year until it is altered.

[*Sir R. Finlay, K.C.* Suppose the value stated in the quinquennial list is 1000*l.* and then there is an increase in value of 500*l.* which is not recorded and that is followed by a decrease of 500*l.* The respondents contend that no deduction is permissible. Or suppose that a house is burnt down and no alteration is made in the quinquennial valuation list and in the following year the house is reconstructed and has its original value; the appellants' construction would lead to an absurd result.]

Any injustice may be avoided by the assessment committee by amending the quinquennial list where any alteration in value occurs. To hold that one standard is to be set up for ascertaining whether a provisional list is to be made and another standard for ascertaining what the provisional list is to contain would be inconvenient and is not warranted by the language of s. 47. The only standard is the comparison between the actual facts of the year in question and the actual facts of the preceding year. [They referred to the Valuation (Metropolis) Act, 1869, ss. 4, 45, s. 46, sub-ss. 1, 3, 4, 5, 6, and s. 47, sub-ss. 1,

2, 3, 6, 9, 10, and to *Reg.* v. *New River Co.* (1); *Reg.* v. *Poplar Union Assessment Committee* (2); *Reg.* v. *Assessment Committee of St. Mary's, Islington* (3); *Ellis* v. *Camberwell Assessment Committee* (4); *Rex* v. *Southwark Assessment Committee* (5); *Parrish* v. *Hackney Corporation.* (6)]

Sir Robert Finlay, K.C., and *Ernest Charles, K.C.* (with them *Arthur Page*), for the respondents.

[THE LORD CHANCELLOR. Upon the main question of construction, the question of the date at which the comparison is to be made, we do not trouble you, but we wish to hear you upon the question of the duty of the committee to appoint a person to make a provisional list.]

As regards the duty of the committee the existence of an alteration in value is a condition precedent to the section taking effect. The assessment committee must first ascertain by inquiry for their own information whether an alteration has taken place in order to see whether it is their duty to appoint some one to make a provisional list. But here there has been nothing beyond a mere fluctuation which does not affect rateable value. The provisional list must contain "the gross and rateable value as so increased or reduced." That involves a provisional list showing a different value from that which appears in the quinquennial list, and if the committee are satisfied on inquiry that in fact there has been no alteration in value they are not bound to appoint a person to make a provisional list. The expression "prima facie" has crept into the cases, but what the statute requires is that the condition precedent should exist. To order a sham reduction of 1*l.* is an abuse of the procedure under the statute, and if no objection were made under the succeeding sub-sections there would be no possibility of threshing the matter out. On the mandamus granted by the Divisional Court the person appointed would have no option but to make a provisional list containing a reduction which he believes to be wrong.

(1) (1879) 4 Q. B. D. 309.
(2) (1883) 11 Q. B. D. 721; (1884) 13 Q. B. D. 364.
(3) (1887) 19 Q. B. D. 529.
(4) [1900] 1 Q. B. 68; [1900] A. C. 510.
(5) [1909] 1 K. B. 274.
(6) [1911] 2 K. B. 822; [1912] 1 K. B. 669.

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THE LORD CHANCELLOR intimated that the appeal would be allowed, but that the form of the mandamus would be altered. In the opinions to be delivered at a subsequent date their Lordships would express a view of the construction of the statute which would be a guide to assessment committees thereafter.

March 26. LORD PARKER OF WADDINGTON. (1) My Lords, I find myself in such substantial agreement with the opinions about to be read to your Lordships by my noble and learned friends Lords Sumner and Parmoor that I need not detain your Lordships at any length.

The first point which your Lordships have to decide arises by reason of the somewhat imperfect draftsmanship of s. 47 of the Valuation (Metropolis) Act, 1869. The object of that section is to provide a prompt remedy if in the course of any year of the quinquennial period the value of any hereditament as stated in the quinquennial list is from any cause increased or reduced, and the section provides a tribunal to determine whether this state of affairs exists, together with the amount of the increase or reduction. Unfortunately the section in terms appears to make the existence of this state of circumstances a condition precedent to any step towards summoning the tribunal which is to determine whether it exists or otherwise. If the section be so construed the question whether the condition precedent is fulfilled would in case of dispute first have to be determined by the High Court as between the occupier of the hereditament in question and the assessment committee, on motion for a mandamus, and subsequently again determined by the assessment committee as between the occupier and the surveyor of taxes. This would be a somewhat startling result, more especially as the scheme of the Act is to make the decision of the assessment committee, or of the quarter sessions on appeal from the assessment committee, final on all questions of fact, and to allow appeals to the High Court on questions of law only.

It would appear from the cases cited before your Lordships that an attempt has been made to get out of the difficulty by substituting for the condition precedent which the Act appears

(1) Read by Lord Dunedin.

to impose a totally different condition precedent, namely, that there should be prima facie evidence that the hereditament in question has for some cause been increased or reduced in value. I cannot find any justification for such substitution. It seems to me that the difficulty is more properly met by treating the increase or decrease in value contemplated by the section as a condition precedent to the ultimate modification of the quinquennial valuation and not a condition precedent to the preliminary steps necessary for the constitution of the tribunal entrusted with the duty of deciding whether, and to what extent, the quinquennial list is to be modified. If this be so, the duty of the overseers to prepare a provisional list on the written requisition of a ratepayer is purely ministerial, and they are not at liberty to refuse to comply with such requisition if bona fide made. In like manner on failure of the overseers to prepare a provisional list the duty of the assessment committee is purely ministerial, and they can only refuse to comply with the ratepayer's requisition if such requisition be frivolous or mala fide, and on motion for a mandamus the sole question is the bona fides of the requisition.

The only objection to this construction is that the overseers are, according to the words of the statute, to enter in the provisional list prepared by them the gross and rateable value of the hereditament "as increased or reduced," but in my opinion these words do not preclude the overseers or the person appointed by the assessment committee from stating the value of the hereditament as it appears in the quinquennial valuation, if in their judgment there has been no alteration in such value.

My Lords, the second point for your Lordships' consideration does not really arise if your Lordships take the view above suggested of the construction of s. 47, and I should have preferred to reserve my opinion upon it. It appears to me to be somewhat dangerous to decide any point upon the construction of such an Act as the Valuation (Metropolis) Act, 1869, otherwise than in connection with some concrete case. But inasmuch as your Lordships think it desirable to deal with the point decided by the Court of Appeal I will venture to make the following observations.

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Lord Parker of Waddington.

In order to bring s. 47 of the Act into operation there must be an increase or reduction in the value of the hereditament in question, and this increase or reduction must have occurred in the course of the year of the quinquennial period in which the provisional list is applied for, and must be due to some such cause as referred to in the section. The values to be compared are (1.) the value of the hereditament when the provisional list is made, and (2.) the value of the same hereditament in the valuation list for the time being in force, and the cause referred to in the section must be a cause operating during the year in which the provisional list is applied for and specially affecting the hereditament in question or hereditaments of the same class, and not generally affecting all hereditaments within the same area. In determining whether there has been an increase or reduction in value due to any particular cause, it would, I think, be legitimate to inquire, first, whether there has in fact been an increase or reduction in value, and, secondly, how far such increase or reduction is due to the particular cause. On the other hand it would be equally legitimate to start with the particular cause and inquire to what extent, if at all, it has affected the value either by way of increase or reduction. But in neither case would it, in my opinion, be possible to arrive at a sound conclusion without considering the conditions and circumstances under which the value as stated in the valuation list for the time being in force had been actually arrived at.

I can find nothing in the Act to justify the contention that for the purpose of the inquiry the conditions and circumstances prevailing at the commencement of the year in which the provisional list is applied for must be assumed to be the conditions and circumstances under which the valuation was made, however false in fact such assumption may be. I agree with the Court of Appeal that for the purpose of the inquiry under s. 47 the existing circumstances and conditions must in every case be compared with those circumstances and conditions which prevailed at the time the valuation was made. At the same time the circumstances and conditions existing at the commencement of the year in question may for many purposes be material. They may, for example, be material in determining whether the particular

cause alleged has or has not been operative within the year, or whether the increase or reduction in value is a permanent increase or reduction or a mere fluctuation. And the same may be said of any change in circumstances or conditions which has from time to time occurred since the value appearing in the valuation list was arrived at.

In the present case the cause of the alleged decrease in value of the appellants' tramways is said to be the competition of motor omnibuses. This is admittedly such a cause as is contemplated in the 47th section, and it has operated during the year in which the provisional list was applied for. In considering whether and how far the value of the tramways has been affected by this competition, the gross receipts and working expenses of that part of the tramway undertaking to which the question relates, both at the time of the making of the provisional list and at the time the valuation appearing in the quinquennial list at the commencement of the current year of the quinquennial period was made, and also any variations between these dates, must be taken into consideration. The amount which a hypothetical tenant would give by the year for the tramways would depend rather on net than gross receipts, and motor omnibus competition may have affected net receipts either by diminishing gross receipts or increasing the expenses necessary to earn them. On the other hand, the course of events since the valuation appearing in the quinquennial list was made may show that the diminution in net receipts is in the nature of a fluctuation which would not influence the mind of the hypothetical tenant. Further, it may appear that at the time of the valuation in the quinquennial list some allowance was made for motor omnibus competition, and this would be of the utmost importance in determining whether a reduction should be allowed.

I think therefore that this appeal should be allowed, but, having regard to the course of the litigation, without costs either here or in the Courts below.

LORD ATKINSON. My Lords, I have had the pleasure and advantage of reading the judgment that has just been delivered. I have also had the pleasure and advantage of reading the

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judgments that are about to be delivered by my two other noble and learned friends. I concur in the result which they have in common arrived at, and I think the lines of reasoning by which they have been led to that result are entirely convincing.

LORD SUMNER. My Lords, part of the appellants' tramway system lies in the borough and parish of Islington, and at the quinquennial revaluation of 1910 it was valued at 57,330*l.* gross, and 36,030*l.* rateable.

The London County Council were advised that the competition of motor omnibuses was the cause, or substantially the cause, of a falling-off in their gross receipts, which occurred during the year ending March 31, 1913, and upon this they required the overseers to make out a provisional list under s. 47 of the Valuation (Metropolis) Act, 1869, and to show in each case a reduction by 1*l.*

The borough of Islington, by its valuation committee, performs by statute the duties of overseers of the parish, and another of its committees is the assessment committee. The appellants complied with the forms prescribed by the section in order to set both of these bodies in motion. The valuation committee replied that, "having regard to the requirements of the above Act," they were not prepared to make a list. The assessment committee declined to appoint a person to make such a list on the ground that the London County Council had given "no prima facie evidence of such a reduction as is contemplated by the section." We do not know precisely what information was before the committee when it was thus decided that no prima facie case had been made. Before doing so they had taken advice, and had had before them, available as the material on which they acted, not only the requisition itself, but also some correspondence passing between the parties, and statistical information supplied by the London County Council's valuer to the assessment committee's adviser, at his request. No doubt this material was not so extensive as that which was ultimately brought before the Court of Appeal on affidavit, but it was certainly considerable, and could have been supplemented from facts placed before the overseers in connection with the previous

quinquennial valuation, from published statistics relating to the appellants' undertaking, and from the experience of the surveyor whom the respondents consulted, an experience undoubtedly wide.

A decision that no prima facie evidence has been given seems to postulate the possibility of ascertaining what evidence, so called, was given. If, however, the contention of the respondents is right, their decision cannot be reviewed, even though it does not appear what precise materials they had before them or how they were obtained. Of course, the good faith of the parties and their advisers is unimpugned.

In supporting their requisition the appellants, in respect of the part of their system lying in Islington, only gave figures for two half-years, namely, those ending with September 30, 1911 and 1912, respectively. I think, however, that the nature of motor omnibus competition with an older tramway system must have been quite familiar to all parties concerned, much as they might differ as to its extent or effect. Corroborative figures for the whole tramway system were added for the half-years ending with March 31, 1912 and 1913. The appellants did not offer figures going back to 1910. Their written communications did not limit their contention as to the period with which comparison ought to be made, to the commencement of the year of alleged change, but I assume that orally they advanced the construction of the statute, which has been argued before your Lordships, and relied on it strongly, though not exclusively. If the respondents, in saying that no prima facie evidence had been given, meant that exclusive reliance was placed by the appellants on a comparison of this limited kind, I am not satisfied that they were right. If they meant that, whatever the contention might be, the figures furnished by the appellants did not go back far enough, I think an excessively narrow view was taken of communications which appear to have been amicable and informal.

When the assessment committee declined to appoint a person to make a provisional list, the London County Council applied to the High Court for a mandamus, since the Act does not provide for any appeal, strictly so called, in such a case. A rule

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nisi was obtained, and was afterwards made absolute by a Divisional Court (Bray and Lush JJ.), but, on appeal by the assessment committee, the Court of Appeal discharged it by a majority. As to the terms of this rule, it is important to observe that it did not merely direct the assessment committee to appoint a person to make a provisional list. It required that the list should be one "containing the gross and rateable values" of the hereditaments in question "as reduced since the making of the valuation list in force in the said parish," on the ground that the said value had been reduced "by reason of the competition of motor omnibuses."

The provisions of s. 47 have effect in a certain case, which is: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value." The present is a case of alleged reduction of value from a cause, namely, the competition of motor omnibuses, which, as has been held in *Rex* v. *Southwark Assessment Committee* (1), is of a character capable of being brought within the section. The respondents formally contested this decision, but the matter was little argued at your Lordships' Bar owing to the course which the case took. Technically, I suppose, it will be open to review by your Lordships on some future occasion, and it is sufficient to assume its correctness for the purposes of the present appeal. All the same, if that decision is wrong, the whole of this discussion is idle, and your Lordships are not accustomed to debate matters at length when there is any real likelihood that such debate may be vain.

Upon analysis it will be seen that the words in question involve (1.) an increase or reduction in value, (2.) which takes place in the course of a year, and (3.) is due to such a cause as comes within the section as interpreted in the decision. To see whether the result is a real change in value, and not a mere fluctuation in passengers carried or fares collected, and also to see whether the value of the particular hereditament is affected as distinguished from a general rise or fall in the value of similar hereditaments in the neighbourhood, observations extending over

(1) [1909] 1 K. B. 274.

a number of prior years may be necessary. They may go back to the year upon which the valuation was made for the purpose of the current or the quinquennial valuation list or even beyond it, but not so as to challenge or impugn that list or valuation as such. Further, it may be necessary to ascertain whether the change, such as it is, was anticipated, so that effect has been already given to it in the valuation list for the time being in force, or whether its operation is, in whole or in part, now newly considered. If the inquiry may be carried back beyond things as they were at the beginning of the year in question for these purposes, as clearly it may, I confess it is not easy to appreciate why the appellants say that for the purposes of seeing whether the change in the value of the particular hereditament is up or down, and how far it extends, prior matters are to be laid out of account.

Increase or reduction in value involves comparison of a new value with an original value. The sum, at which the hereditament in question is entered in the valuation list in force for the time being, is clearly the value on which the rate is to be levied until a provisional list has been duly and finally made. This, therefore, constitutes the point of departure, from which the amount of the increase or decrease is to be reckoned, when some increase or decrease has been established. The provisional list will not contain a valuation de novo, but an estimation of the amount of change, and, to the extent of that change, a correction of the sum entered in the list, which was in force for the time being. This is due to the nature of the thing and to the object at which s. 47 aims, not, be it observed, to the provision as to conclusive evidence in s. 45. But although this is so when the problem is to measure the quantum of the change for practical rating purposes under the Act, it is quite a different thing when the problem is to ascertain whether the value of the hereditament has actually changed or not. The circumstance that the change is to be one occurring in the course of the year does not show that the condition of things with and from which the change began is to be found only in a comparison with the facts relevant to the value at and from the commencement of the year in the course of which the change occurs.

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If the question were only "Has there been a change?" we should still be at large and have to find the answer to the next question, "Change since when?" But when the nature of the thing is rating, and rating on the quinquennial system under the Act of 1869, there is at least no warrant for answering the question by excluding facts as they were before the beginning of the year in question. To go beyond the beginning of the current year in order, say, to find out if there has been a change or only a fluctuation, and yet to stop short at that time as soon as a change has been established and not a mere fluctuation, is anomalous. I think the contention itself really results, partly from confusing proof that there is a change in value with the effect of that proved fact on the valuation list; partly also from assuming that, because the figures in the list in force conclusively prove the value for the purposes of s. 45, and because that list is in force till altered under s. 47, therefore the question of a change under s. 47 is a question also under s. 45, or to be treated as if it were so.

My Lords, I think the true answer is that the comparison goes back to things as they were at the commencement of the operation of the valuation list in force for the time being. This is involved in the scheme of this part of the Act. Certain observations of Brett M.R. and Bowen L.J. in *Reg.* v. *Poplar Union Assessment Committee* (1) were relied on as authority to the contrary, but the true effect of those observations, and the distinction between that somewhat difficult case and the present one, are fully pointed out by Kennedy L.J. in his judgment below (2), to whose words on this point I can add nothing.

For purposes of convenience the statute takes five years as the period within which hereditaments will normally remain unchanged in value. It provides for abnormal cases, not by revaluation de novo but by supplemental or provisional lists, as the case may be. It does not anticipate any change, but it measures the extent of it when its occurrence is proved. The question is, by how much has that which has occurred falsified the quinquennial valuation? This involves comparing the state of things

(1) 13 Q. B. D. 364, at pp. 370 and 373.

(2) [1914] 3 K. B. at pp. 526 and 527.

as changed with the state of things as valued, so as to measure the change. It is true that the change is one which is to take place "in the course of any year," but the Act does not say "increased or reduced in value from the state of things existing at the beginning of that year," still less "from something which is conclusively deemed to be such state of things." The provision that the valuation list is to be conclusive evidence of the gross and rateable value of the hereditament at the beginning of the year is not the same thing as saying that the actual values shall be deemed to have remained unchanged since the beginning of the quinquennium. The majority in the Court of Appeal adopted this construction of the section, and in this part of their judgments, better expressed than I can express the matter, I entirely agree.

The Divisional Court inquired not only whether the assessment committee had discharged their duty in respect of the appointment of a person to make a provisional list, but also whether a reduction had been shown. The assessment committee had held that there was no prima facie case for any change, though I think that their real meaning was that, on the materials brought before them, formally and informally, from various sources, they thought that nothing had occurred beyond a fluctuation, and that the appellants were contending the contrary under an erroneous interpretation of the Act. The Divisional Court, instead of simply declaring that this was a prima facie case, and directing the assessment committee to act accordingly, directed that they must appoint a person to make a list showing a certain alteration, though without fixing its amount.

The Divisional Court accordingly considered the questions of fact arising upon the evidence before them. In the Court of Appeal these questions of fact were considered even more fully, and the opinion was expressed, (1.) that the duty of the assessment committee, if they appoint a person to make a provisional list at all, is to direct him in which way to alter it, leaving to him only the amount of the alteration; (2.) that the assessment committee rightly decided that no prima facie case for a change had been made out at all, and, therefore, rightly refused to

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appoint a person to make a list; and (3.) that the London County Council failed to prove any alteration in value, because if the state of facts alleged to evidence a change in value was compared only with the state of facts as they stood at the commencement of the year of alleged change, the comparison proceeded on a wrong principle; while if it was properly compared with the state of facts on which the previous quinquennial valuation was based, it only established a fluctuation and not a reduction in value. From this, it would seem to follow that the function of the assessment committee under sub-s. 2, whether administrative or judicial, is sufficient to bind the person appointed, except as to quantum; that it is so far judicial that the mode in which it is discharged can only be reviewed on mandamus for error of law, and that although it may be reviewed on all grounds under sub-s. 6 by the committee after hearing the applicant, no occasion for hearing the applicant and reviewing the decision will arise if, in the first instance, the decision of the committee is against him under sub-s. 2 when he has no right to be heard.

My Lords, it is only to part of these propositions that I am able to agree. I think that, throughout, the distinction was lost sight of between a mandamus to compel the assessment committee to do their duty, whatever that may be, under s. 47, sub-s. 2, and to compel them to do their duty, or to vary their actual decision under s. 47, sub-s. 6. It would have been sufficient in the first case to have decided that, contrary to the declared opinion of the committee, there was, nevertheless, a prima facie case, or, rather, a case sufficient to raise a duty to appoint a person to make a provisional list, and then to have directed that such a person be appointed. It seems to me that only under sub-s. 6 does it become material to examine into the whole of the evidence, both that which was put forward as constituting such a case and that which was relied on to prove it out and out; and then the question would be not whether the ratepayer's case is proved, but whether there has been any error of law on the part of the committee. In the former case the question must be whether there is sufficient material forthcoming from the ratepayer to make it the duty of the committee to go further into the

matter, and, through the medium of a provisional list, to give opportunity for full inquiry and consideration.

My Lords, the extreme contention of the respondents has been that it is a condition precedent to every step taken under s. 47, or at any rate to the first step taken by any separate official entity thereunder, that the initial words of the section should be satisfied. I think this at least is erroneous. No provisional list ought to be put in force finally unless these words are satisfied, but the steps of this process are many. It cannot be that the overseers are to do nothing, however plausible or probable the case for a change may be, unless and until a change actually is established within the words of the section. It cannot be that they are made judges of the question whether a case for a provisional list will ultimately be made out or not. The statute does not use the word "error" or give an "appeal," words appropriate to such a determination. It speaks of "default," bringing into play the activity of another administrative body. Similarly the assessment committee act at two different stages, and it is on the second, under sub-s. 6, that they hear and determine. Their duty under sub-s. 2 is purely an administrative one. Having received a requisition in due form, their duty is, in cases where the overseers have made no provisional list, to appoint some person to do so, unless it is apparent on the face of their application or of the facts available for their information that there is no arguable case, whether for reasons of fact or of law. It is in this sense that I think the expression "prima facie case" ought to be understood which has been repeatedly used in connection with sub-s. 2 but is not to be found in the Act itself. I can see no warrant for a refusal to put matters in train for a hearing and for a decision on the merits at this stage before the applicant has been heard, provided always that his application is made seriously, sanely, and in good faith. The section says nothing about refusing the application unless a prima facie case is made. I admit it says nothing either about refusing the application when it is made in bad faith or is frivolous, but I think common sense supplies this. The assessment committee may safely and properly refuse to waste the ratepayers' money by appointing a person to make a provisional list, when the case laid before them

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in the first instance is such that the High Court would not grant a rule nisi for a mandamus to compel them to act. I think this is a sufficient protection.

On the other hand, under sub-s. 6 their function is clearly judicial; they hear and decide, a fact which is in itself, to my mind, conclusive, first, against the contention that their function is judicial under sub-s. 2 when they do not hear at all; second, against the view that the satisfaction of the opening words of the section is a condition precedent to action even under sub-s. 2; and, third, against the view that the appointment of a person to make a provisional list is in itself a determination by the assessment committee, binding upon him, that some change has occurred, up or down, as the case may be, and that all he has to do is to measure it. I think that the scheme of the sub-sections is that either the overseers, in the first instance, or, them failing, the appointed person, makes a provisional list, which is open to acceptance or objection by the parties concerned.

If the ratepayer or the surveyor of taxes, or maybe, the assessment committee themselves, think it open to exception, then it comes up for hearing and decision under sub-s. 6. Upon this latter occasion prima facie evidence, being a judicial expression, would be correct, and the ordinary principles which govern the grant of a mandamus to a body discharging judicial functions would apply. As upon an application for a writ of mandamus, evidence is reviewed for the purpose of deciding some question of law or of the propriety of the conduct of the body concerned, I take the view of the majority in the Court of Appeal in the present case to have been that the evidence in the case is all one way and shows, as a matter of law, that what has occurred is a fluctuation in net receipts only, and not a change in the rateable value of the hereditament. In this view I am not able to concur as at present advised, and in this respect I think the judgments of the majority of the Court of Appeal were wrong, but the case must go back to the assessment committee, so that the London County Council may proceed further with it if they think fit. It is better not to discuss any aspect of the facts now. I think that the decision of the assessment committee refusing to appoint a person to make a provisional list

was rightly set aside by the Divisional Court, and that the writ of mandamus then issued ought not to have been set aside in the Court of Appeal, but should be restored.

There is, however, a question as to the form of this mandamus, and as to the course to be pursued. The writ directed that the provisional list should show the value as reduced. The return to the writ stated that the assessment committee had appointed a person, and that person, in compliance with the writ as he understood it, showed values in each case reduced by 1*l.* Obviously, in his opinion, there was no reduction in fact. He had so advised the committee, and had not changed his opinion.

The view taken was (and such I think has been the practice) that "such provisional list," in sub-s. 2, means such as the overseers, had they not been in default, would have made under sub-s. 1, which so far seems to me to be right, and that sub-s. 1 requires their list to contain "the value as so . . . . reduced," meaning "as reduced by any cause in the course of the year," within the first words of the section. If this means "as the applicant contends that it has been reduced," the subsequent provisions for objection by the ratepayer become nugatory; besides, the applicant need not name any figure in his requisition at all. If it means "as truly reduced," it obliges the overseers to do at the outset by anticipation what can only be really done at the end, after objection, hearing, and decision. Accordingly, unless the remaining sub-sections are to be nullified one way or the other, I think it only means, "as they think it ought to be reduced, if at all," leaving the surveyor of taxes or the ratepayer to object, if he thinks fit, and the assessment committee to decide the objection as is just. In this view, which does no more violence to the language than is necessary to give it sense, this list in the first instance may restate the existing figure, if the appointed person thinks there has been no real change.

In the result, as it seems to me, the appeal must be allowed and the decision of the Divisional Court restored, except that all direction to show a reduced value should be omitted from the writ, and no declaration should be made that some actual reduction has been proved. It will then be open to the committee to re-appoint the same person or to appoint another,

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and in the former event for him to state the same value as he did before, or another, if he is satisfied as to it; and thereafter it will be competent for the London County Council, or the surveyor of taxes, to carry in objections, and bring their evidence before the committee, and for the committee to decide on the evidence as may be just. I think I should add that, in my opinion, the views expressed in the Court of Appeal upon the effect of the evidence, however weighty, do not bind the committee as if they decided a question of law.

LORD PARMOOR. My Lords, I am authorized by the Lord Chancellor to say that he concurs in the opinion which I am about to read.

It is unnecessary to repeat the narrative of the steps which bring this appeal before your Lordships. The point involved is the construction of s. 47 of the Valuation (Metropolis) Act, 1869. This Act introduced the principle of quinquennial valuation, and a valuation list is conclusive for all the purposes mentioned in s. 45, that is to say for the purpose of the House Tax Act and Income Tax Act, as well as for the purpose of the rates specified in the section. Mr. Ryde argued that s. 45 made the valuation list in force for the time being conclusive evidence of the value of the premises for all purposes, but this ignores the limitation expressly inserted in the section and would introduce an artificial basis of value for which, in my opinion, there is no warrant. I will refer again to this question at a later stage.

It is a main object of the Act to avoid the necessity of the annual preparation of a new valuation list; but provision is made in ss. 46 and 47 whereby a supplemental or provisional list may be made to correct any unfairness attributable to alterations in value which occur during the quinquennial period. Sect. 46 enacts that the supplemental list shall show all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alteration.

The making of a supplemental list does not necessitate a new

valuation of the premises included in such list. A new valuation of the premises within the quinquennial period would be inconsistent with the quinquennial principle and frustrate the main purpose of the Act. The supplemental list is intended to show how far alterations which have taken place within the preceding twelve months have affected the value of the particular premises in the valuation list, such value to be treated as correct at the time it was made, and to be corrected only to the extent that it has been increased or reduced: *Reg.* v. *Poplar Union Assessment Committee.* (1) It is not necessary to consider further the sub-sections of s. 46.

Sect. 47 makes provision for a provisional list which enables an alteration in the valuation list to become effective at an earlier date than in a supplemental list. Two questions arise on s. 47. The first is whether the conditions stated at the commencement of the section are conditions precedent, or conditions which must be proved before the section can be brought into operation. The second question is, What is the meaning of these conditions when they become operative? On the first question I think that in substance the contention of the appellants is right, although I cannot agree in the form of the mandamus. The meaning of s. 47 is that any ratepayer who has a bona fide case shall be able to bring his case for hearing and determination by the assessment committee under sub-s. 6. There is no provision for any hearing of the merits at an earlier stage, and the procedure is practically the same as when the original valuation is made. Sub-s. 1 places an obligation on the overseers of the parish to send to the assessment committee a provisional list, and, if this duty is not performed, then sub-s. 2 places a duty on the assessment committee to appoint a person to make such provisional list, in the same manner as in this Act provided in the case of the overseers failing to transmit a valuation list.

At this stage the office of the assessment committee is simply ministerial. The appointment of a person to make the provisional list is merely a step in the procedure to bring the question for determination before the assessment committee, and involves no prejudice to either party. The form in which the provisional

(1) 13 Q. B. D. 364.

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list is forwarded to the assessment committee is not in itself of importance, but I see no reason why it should not be forwarded without either an increase or deduction in the gross and rateable value of the hereditament if the person appointed comes to that conclusion on the materials before him. Whatever the conclusion may be, there is no provision for any hearing before the person appointed, and it is not the province of such person to anticipate the inquiry in sub-s. 6.

In the present case there is no question of the bona fides of the application of the London County Council, and I think that the London County Council are entitled to a mandamus ordering the assessment committee to appoint a person to make a provisional list under s. 47, but that the order was wrong in directing that such provisional list should contain a reduced value. In the present case the difficulty is shown in the return to the writ of mandamus and in the statement of Mr. Harold Eve that he has made a provisional list as directed but that such provisional list is in his opinion inaccurate.

My Lords, if the view stated above is correct, no affidavits are required in making an application to the Court for a mandamus except such as show that the assessment committee have not fulfilled their statutory duty, and that the application is bona fide in character. In my opinion all those portions of the affidavits which relate to the details of valuation are irrelevant and inadmissible at this stage, and I think it is impossible to form any sound conclusion on such matters until they have been sifted and ascertained before the tribunal of fact specially appointed for this purpose. Before any provisional list becomes effective, a copy of the list must be served on the surveyor of taxes for the district, and a copy of so much of the list as relates to that hereditament must be served on the occupier of any hereditament to which the list relates. An objection may be made to the list by the occupier and by the surveyor of taxes, or by either of them, and on the receipt of such notice the clerk of the assessment committee must forthwith summon a meeting of the committee, giving notice of the time and place of such meeting to the overseers, to the surveyor of taxes, and to the occupier. Under sub-s. 6 it is the duty of the assessment committee to hear

and determine all the objections in the same manner as if it were an objection to a valuation list, and to make such order as they think just. This gives an opportunity to the parties interested to appear at the meeting of the assessment committee, and to state their case, before the assessment committee come to a determination. There is no right of appeal to quarter sessions. On questions of fact the decision of the committee is final, and not open to review before any Court unless it can be shown that they have gone wrong on a point of law. It is premature to consider what principles are applicable in determining an objection raised before the assessment committee until the case has come before the committee for decision, but having regard to the course which the case has taken, and to the arguments addressed to your Lordships, I think that it is necessary to express an opinion on certain principles to which the attention of the House has been directed.

The paragraph at the commencement of s. 47 directs the assessment committee as to the considerations which should guide them in hearing and determining an objection to a provisional list. In the first place, the section does not direct a new valuation such as might be necessary in preparing a new valuation list at the end of the quinquennial period. Such a construction would stultify the whole principle of quinquennial valuation and be inconsistent with the plain meaning of the Act. I think that in this respect there is no difference between ss. 46 and 47, and I accept the judgment of Bowen L.J. in *Reg.* v. *Poplar Union Assessment Committee.* (1)

In the second place, the cause which has operated to bring about an increase or reduction of value must be a cause specially affecting the hereditament, or class of hereditament, in respect of which an increase or decrease of value is alleged, and not a cause generally affecting the value of property within the area of the rating authority: *Camberwell Assessment Committee* v. *Ellis.* (2) In this case Lord Davey says (at p. 523): "It is not sufficient to say that there has been an alteration in value, but you must point to some definable cause to which that alteration is due, and that cause must be one which affects the assessable

(1) 13 Q. B. D. 364. (2) [1900] A. C. 510.

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value of the particular property. It may affect the assessable value of other properties as well, but it must, in my opinion, be a cause which directly affects the assessable value of the particular hereditament in question."

This case was decided under s. 46, but the principle decided is equally applicable to s. 47. This same case finally settled a third point in which the same considerations apply under s. 47 and s. 46. The words in s. 47, ". . . . by the addition thereto or erection thereon of any building or is from any cause increased or reduced in value," are not confined to structural alterations, but in the words of Lord Halsbury (at p. 520), "I lay down no general proposition of law beyond this—that the statute has to be construed in each case and applied to the circumstances of each case." Loss of traffic on a railway due to the competition of tramways, tube railways, and motor omnibuses has been recognized as a cause which may specially operate to affect the gross and rateable value of the particular hereditament: *Rex* v. *Southwark Assessment Committee.* (1) Whether in any case the loss of traffic denotes a permanent reduction in rateable value, as distinct from a mere fluctuation, is a matter of fact to be determined by the assessment committee on the hearing of the objection. If the assessment committee do come to the conclusion that the loss of traffic is due to a temporary fluctuation, this fact in itself would not be sufficient evidence of alteration in gross or rateable value. I agree with the views expressed by Brett M.R. in the case of *Reg.* v. *Poplar Union Assessment Committee.* (2)

The question which the London County Council has raised in the present case has not, in my opinion, been expressly decided, although the view expressed by Bowen L.J. in the case of *Reg.* v. *Poplar Assessment Committee* (2) is in favour of the contention of the respondents. The question may be stated as follows: In making the inquiry whether the value of any hereditament has been increased or reduced from a definable cause affecting the particular hereditament during the preceding year, is the comparison to be made with the state of facts which existed when the valuation in the valuation list was actually made, or with the state of facts which existed at the commencement of the

(1) [1909] 1 K. B. 274. (2) 13 Q. B. D. 364.

preceding year? I have no hesitation in adopting the construction for which the respondents contend. The object of the provisional list is to give an opportunity of amending the valuation list so as to bring it into harmony with fact during the quinquennial period, and it is demonstrable that this result is not obtained on the strained construction put forward on behalf of the appellants.

Mr. Ryde did not contest the failure of the Act on his construction to bring about a fair result, but relied on the words of s. 45, which make the valuation list for the time being conclusive evidence of the gross and rateable value of all hereditaments inserted therein for the purpose of the section. He argued that this section made the valuation list for the time being in force conclusive evidence of the actual value of all the hereditaments therein inserted, however much the circumstances might have altered from the conditions when the valuation was in fact made. There are no such words in the section, and to introduce them would be to create the very anomalies which it is the object of the supplemental and provisional lists to correct.

A simple illustration of the way in which the construction contended for by Mr. Ryde would defeat the object of the Act to adjust the value of hereditaments in accord with facts during the quinquennial period was given by Sir Robert Finlay. He took the case of a house burnt down and subsequently reconstructed in a preceding year during the quinquennial period, of which the gross and rateable value had not been altered from the value inserted in the original valuation list, and which, after the reconstruction, had the same value as at the date of its insertion in the original valuation list. If the value standing in the valuation list after the burning of the house is to be taken as the figure for comparison, it follows that the gross and rateable value should be increased beyond that figure to the extent of the alteration in value due to the construction of the house, and that the hereditament would be rated at a fictitious and unjust figure.

On the other hand, if the conditions, when the house is rebuilt, are compared with the conditions when the last valuation

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was actually made, then the adjustment, if any, would be on the basis of a comparison of facts, and the result would give the true gross and rateable value on the assumption that the original valuation had been fairly made. This assumption is essential to maintain the principle of quinquennial valuation.

If it is necessary to take a second illustration of the extent to which the principle contended for on behalf of the appellants might defeat the object of the Act to amend a valuation so as to bring it into accordance with fact, such illustration may be found in the case of a tramway or other industrial undertaking in which the rateable value is arrived at by a deduction from profits. Take four consecutive years, in which the profits from which the rateable value is to be deduced stand at x, $x + a$, $x + a + b$, x. According to the principle advanced on behalf of the appellants, the ratepayer could claim a provisional list based on a profit of $x - a - b$, which, so far from bringing the rateable value into harmony with fact, must necessarily produce a fictitious figure, unfair to other ratepayers in the district. If the profits in the four consecutive years had stood at x, $x - a$, $x - a - b$, x, then, according to the same principle, the overseer could claim a provisional list on the basis of a profit of $x + a + b$, which would be manifestly unfair to the particular ratepayer.

My Lords, I have no hesitation in accepting on this point the judgment of Kennedy and Swinfen Eady L.JJ., and I think that the opposite view is based upon a wrong construction of s. 45. Both sides referred in support of their argument to the case of *Reg.* v. *Poplar Union Assessment Committee.* (1) The opinion of Bowen L.J. is certainly not in opposition to the opinion which I have expressed, and I quote the same passage as is quoted in the judgment of Swinfen Eady L.J.: "Taking a broad view of the Act, I think that it would not be consistent with the Act to have the value ascertained by the quinquennial list wholly set aside, whenever any alteration in the value of the hereditament was shown to have taken place within the preceding twelve months, but that such list ought to be treated as correct at the time it was made, and be corrected only to the extent it has been

(1) 13 Q. B. D. 364, 373.

affected by such alteration." The crucial words in this passage are "as correct at the time it was made."

My Lords, in my opinion the appellants are entitled to a mandamus, and to this extent they succeed in the appeal, but the respondents are right in their contention as to the years between which the comparison should be made, and there should be no costs on either side either in this House or in the Courts below.

Ordered and adjudged that the order of the Court of Appeal be reversed and the order of the King's Bench Division be varied by striking out the words "as reduced since the making of the valuation list in force in the said parish" and also the order as to costs, and that, subject to such variation, the said order be restored. Further ordered that the writ of mandamus issued pursuant to the said order be varied by striking out the words "as reduced since the making of the valuation list in force in the said parish" and by modifying the recitals thereof accordingly.

Lords' Journals, March 26, 1915.

Solicitor for appellants: *Edward Tanner.*
Solicitor for respondents: *A. M. Bramall.*

[HOUSE OF LORDS.]

H. L. (I.)*
1915
March 25.

MARRON (PAUPER) . . . . . APPELLANT;

AND

COOTEHILL No. 2 RURAL DISTRICT COUNCIL . . . . . RESPONDENTS.

Local Government—Ireland—Labourers' Cottages—Improvement Scheme—Letting of Cottages—Right of Preference—Labourers (Ireland) Act, 1906 (6 *Edw.* 7, *c.* 37), *s.* 29.

Sect. 29 of the Labourers (Ireland) Act, 1906, (sub-s. 1), requires the district council to make regulations with respect to the letting of cottages and allotments under the Labourers Acts, and for preventing any undue preference in the letting, and (sub-s. 2) enacts that these regulations shall provide that on the first letting of any cottages or allotments comprised in a scheme preference shall be given to agricultural labourers who have made the representation on which the scheme was founded, or on whose behalf the representation was made.

A district council built cottages under the Labourers Acts in pursuance of a scheme of improvement founded upon representations made by or on behalf of agricultural labourers in the district, including the plaintiff. The representation made on behalf of the plaintiff suggested that a cottage should be built for him on a particular site. On the completion of this cottage the plaintiff applied to the council to be admitted as the first tenant thereof, but the council preferred another labourer on whose behalf no representation had been made but whose need was more urgent. At this date no regulations in pursuance of s. 29 were in force. The plaintiff brought an action to enforce his claim to this cottage:—

Held, assuming, without deciding, that the preferential right to a cottage under a scheme depended on the statute itself and not on the regulations, that a labourer on whose behalf a representation had been made had no title to any specific cottage, and that the action failed.

Condon v. *Mitchelstown Rural District Council* [1914] 1 I. R. 113 approved.

Decision of the Court of Appeal in Ireland [1914] 1 I. R. 201 affirmed.

Semble the preference on first letting referred to in s. 29 is not an

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* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

absolute preference, but the district council has a discretion to prefer a labourer on whose behalf no representation has been made but whose claim is more meritorious.

APPEAL from a decision of the Court of Appeal in Ireland reversing a decision of the Master of the Rolls. (1)

The appellant was an agricultural labourer within the meaning of the Labourers (Ireland) Acts, 1883 to 1906.

On December 3, 1906, a representation on behalf of the appellant on Form 1 in the schedule to the Labourers (Ireland) Act, 1906, was lodged with the respondents. The form was signed by three ratepayers in the electoral division of Anny, who represented that there was not a sufficient number of houses available for the accommodation of agricultural labourers in the above named electoral division and that it was the duty of the respondents to take proceedings under the Labourers Acts for the making of an improvement scheme in respect of that division, and suggested that a cottage with a suitable plot of land attached thereto should be built for the appellant on the holding of James Carey in the townland of Aughnamullen. This representation amongst others was subsequently considered by the respondents, and an improvement scheme embracing the representation lodged by the appellant was unanimously adopted. A local inquiry into the scheme was then made by an inspector of the Local Government Board. The inspector on February 26, 1908, made an order confirming the scheme, subject to certain modifications not material for the purposes of the present appeal, and his order was confirmed by the Local Government Board under s. 6 of the Act of 1906. In 1910 the site on the lands of James Carey was acquired by the respondents. The scheme provided for the erection of twenty-five cottages, and by the month of July, 1912, five of these cottages, including the cottage in the townland of Aughnamullen were completed, and three more were in the course of construction. On August 2, 1912, the respondents considered applications from the appellant and from one Joseph Kennedy, an agricultural labourer resident in the rural district, for the tenancy of the Aughnamullen cottage and resolved that the cottage should be let to Kennedy. A representation on

(1) [1914] 1 I. R. 201.

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behalf of Joseph Kennedy had been lodged with the respondents on January 31, 1908, but it was not one of those upon which the above mentioned improvement scheme was founded.

The minutes of the proceedings on August 2, 1912, were as follows:—

"Aughnamullen Cottage.

. . . . . .

"Proposed by Mr. A. Heaney. Seconded by Mr. R. Harrison —That Joseph Kennedy of Corfad be given the labourer's cottage in the townland of Aughnamullen in so far as he is a married man with a wife and family and a bona fide labourer in the union of Cootehill, the other applicant being a single man and not residing in the union. Which was carried that J. Kennedy get the cottage by 6 to 4 he attending on Tuesday 6th inst. to sign bond and get key."

No regulations pursuant to s. 29 of the Labourers (Ireland) Act, 1906 (1), were in force on August 2, 1912. Regulations had been made by the respondents, but such regulations were not confirmed by the Local Government Board until September 16, 1912.

On January 31, 1913, the appellant commenced this action against the respondents claiming: (1.) a declaration that he was entitled in preference to Kennedy or other person on whose behalf no representation was lodged to be admitted as tenant to the respondents upon the first letting of the Aughnamullen cottage; (2.) to be put into possession of the cottage as tenant to the respondents upon signing the usual contract of tenancy; (3.) an injunction to restrain the respondents from continuing to let the cottage to any person other than the appellant or otherwise attempting to defeat the right of the

(1) Sect. 29 of the Labourers (Ireland) Act, 1906, provides:

Sub-s. 1. "The district council shall make regulations with respect to the letting of cottages and allotments under the Labourers Acts, and for preventing any undue preference in the letting thereof, and generally for carrying the provisions of the said Acts into effect."

Sub-s. 2. "Regulations under this section shall provide that, on the first letting of any cottages or allotments comprised in a scheme, preference shall be given to agricultural labourers who have signed on their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made."

appellant to such preference; (4.) an injunction to compel the respondents to make a letting to the appellant and for that purpose to do all necessary acts for obtaining vacant possession of the cottage; (5.) damages.

The respondents by their defence alleged that in the exercise of their discretion they made a letting of the cottage to Kennedy as the more suitable applicant and that they were and had always been willing to give to the appellant a preference on the letting of cottages and allotments comprised in the scheme and to make a letting of another such cottage and allotment to him on completion. They also pleaded that no regulations were in force at the date of the letting of the cottage to Kennedy.

It was proved at the trial that the appellant was an unmarried man hired by the half-year and boarded and lodged by the farmers who hired him and that at the date of his application for the cottage he was hired and living at Newbliss outside the Cootehill No. 2 Rural District under a contract of service which would not determine for some months. It was also proved that Kennedy was an agricultural labourer working within the district for any farmer who employed him and was a married man with a family of small children; that he lived in a cottage in a sunk position by a river, and that the cottage was flooded in winter. There was also evidence by a medical man to the effect that the situation of the cottage was dangerous for small children and that the cottage was without any sanitary convenience and unfit for the number of people occupying it.

The Master of the Rolls found that the respondents had acted perversely and held that the appellant was entitled to a preference over Kennedy upon the first letting of the Aughnamullen cottage, and that his preferential right had been violated, and he awarded the appellant 30*l.* damages for the violation of his legal right. The Court of Appeal (the Lord Chancellor, Holmes and Cherry L.JJ.) reversed the decision of the Master of the Rolls and dismissed the action.

March 2, 4. *Serjeant Sullivan, K.C.* (of the Irish and also of the English Bar), and *D. J. O'Brien* (with them *J. T. Donovan*) (the two latter of the Irish Bar), for the appellant. 1. The

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preference in favour of representators (1) under s. 29 of the Labourers (Ireland) Act, 1906, is conferred by the Act and not by the regulations, and the district council cannot deprive any representator of that preference by abstaining from making regulations in pursuance of the section. 2. A representator has a preferential right to the particular cottage in respect of which his representation is made. 3. As between a representator and an outside labourer the former must be provided for before the latter is introduced into the scheme. In *Rex* (*Ferguson*) v. *Lurgan Rural District Council* (2) the district council had let to the designated labourer the designated cottage, but proposed to eject him because he would not pay an increased rent. The labourer applied for a mandamus calling on the council to make regulations under s. 29 on the ground that he would then have a legal right to the cottage on first letting at the regulation rent. It was held that the preference under the section was a legal right and a mandamus was granted. In *Rex* (*Ryan*) v. *Recorder of Cork* (3) a similar view was taken of the construction of the section. *Tevlin* v. *Lisnaskea Rural District Council* (4) is directly in point. Palles C.B. (with the concurrence of Madden and Kenny JJ.) there held (1.) that the intention of the Legislature with regard to the preferential right depended not on the regulations but on the statute itself, and that consequently the omission to make regulations could not deprive the privileged class of that right, and (2.) that any member of the class might sue for damages for the privation of his right. *Condon* v. *Mitchelstown Rural District Council* (5) is limited to a claim to a particular cottage and to that extent is opposed to the appellant's contention, but it does not affect *Tevlin* v. *Lisnaskea Rural District Council.* (4) Under s. 5 of the Labourers (Ireland) Act, 1883, a labourer who made a representation was bound to suggest a particular site for the building of a cottage for him, and, although this section has been repealed by the Act of 1906, the prescribed form of representation provides for the description of the site upon which the labourer seeks to have a cottage erected, and in

(1) See Lord Atkinson's observation at p. 805, post.
(2) (1910) 47 I. L. T. 31.
(3) [1913] 2 I. R. 241.
(4) [1914] 2 I. R. 15.
(5) [1914] 1 I. R. 113.

practice the suggestion is invariably made. Preference in sub-s. 2 of s. 29 is equivalent to priority and means an absolute preference. [They also contended on the evidence (1.) that Kennedy was not an agricultural labourer within the definition in s. 93 of the Irish Land Act, 1903, inasmuch as he was in occupation of more than one quarter of an acre, and (2.) that the respondents had not acted in the honest exercise of their discretion.]

Jellett, K.C., *Gerald Fitzgibbon, K.C.*, and *Edward S. Murphy* (all of the Irish Bar), for the respondents, were not called on.

The House took time for consideration.

March 25. VISCOUNT HALDANE L.C. My Lords, I think that this appeal ought to fail, and I rest this conclusion on reasons which I can express briefly.

The Master of the Rolls made a declaration that the appellant was entitled, in preference to Kennedy or any other person on whose behalf no representation was lodged, to be admitted as tenant of the plot and cottage in question, and awarded the appellant 30*l.* as damages. The Court of Appeal reversed this judgment. I have come to the conclusion that the Court of Appeal was right.

Sect. 29 of the Labourers (Ireland) Act, 1906, begins by imposing on the district council the duty of making regulations with respect to the letting of cottages and allotments under the Labourers Acts, and for preventing any undue preference in the letting, and generally for carrying the provisions of this Act into effect. It then goes on to enact that these regulations shall provide that on the first letting of any cottages or allotments comprised in a scheme preference shall be given to agricultural labourers who have made the representation on which the scheme was founded, or on whose behalf the representation was made.

My Lords, I can conceive a case in which a labourer belonging to the class defined by the making of a representation would be entitled to a mandamus to compel the council to make regulations. It is also possible—it is not necessary to express an opinion on the point—that such a labourer might be entitled to an injunction in a case where the council was so proceeding as to deprive him of all chance of a letting. But I am unable to find in the section

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language which entitles the labourer to assert title to a specific holding in a case like the present. The scheme here provided for the erection of twenty-five cottages. The right of the appellant is not to any particular cottage, but to a preference over strangers in the carrying out of the scheme as a whole. Assuming, for the sake of argument, that it was wrong to let to Kennedy, in so far as some person in the class entitled would thereby be left unprovided for, it does not follow that the appellant was injured. For he had no title to the particular cottage allocated to Kennedy, and his right might have been satisfied by the allocation of some other cottage.

I read the section as intended to give to the council a discretion as to how a scheme is to be carried out in detail, provided the general principle laid down in the section is adhered to, and I do not find it proved that the principle has been, or will be, departed from in this case. I therefore think that neither the declaration of title to the specific cottage made by the Master of Rolls, nor his award of damages, can be supported.

I have only to add that the case attempted to be made as to want of bona fides in the exercise of their discretion by the council appears to me to fail. The members may have given wrong reasons for what they did, but they acted within their powers, and legitimately.

I move accordingly.

LORD DUNEDIN. My Lords, the plaintiff, an agricultural labourer on whose behalf an application was lodged to be admitted as tenant on the first letting of a certain labourer's plot and cottage, which formed part of an improvement scheme promoted by the defendants, the rural district council, and confirmed by the Local Government Board, was not admitted as tenant to that plot, one Kennedy being preferred to him. In this action he asks, first, for a declaration that he is entitled to a preference as against Kennedy or any other person by whom or on whose behalf no representation had been signed; second, for an order putting him in possession of the plot on his signing a lease; third, for an injunction against the defendants letting the plot to any other than him; and fourth, for damages.

The learned Master of the Rolls, before whom the case depended, gave him the declaration asked for and 30*l.* damages, but refused the further relief on the ground that Kennedy was not cited as a party to the action. The Court of Appeal reversed that judgment and dismissed the case.

My Lords, the plaintiff's whole case is rested upon sub-s. 2 of s. 29 of the Act of 1906, which I need not quote again.

Now it is quite clear that whatever right this gives it cannot give a right to a specific cottage, being one out of a number in a scheme.

The judgment of the Irish Court of Appeal in *Condon's Case* (1) was, I think, clearly right; and if that is so it seems to me to follow that it is quite impossible to give the plaintiff damages. Granted that Kennedy was unduly preferred to him, how does it follow that some one else, with the qualification that Kennedy did not possess, may not, with Kennedy out of the way, still be preferred to the plaintiff? The position is analogous to that in decided cases where a disappointed candidate at a bursary election has failed to secure damages against the electing body, even although the person actually elected, being ineligible, was not found able to hold the bursary. And how can we tell if the plaintiff will not yet be offered some other cottage in the scheme? So much for damages.

As regards the declaration, standing by itself it is but a Pyrrhic victory, for, for the reasons already given, it cannot be translated into any active relief.

But is he even entitled to the declaration as it stands?

My Lords, I confess that on first impression I was inclined to think that the preference given (which ought to be included in the regulations when made, and which I will for the moment assume, without deciding, is just as efficacious as if the regulations had de facto been passed) by the 2nd sub-section of s. 29 is an absolute preference. But on maturer consideration I have come to think that the view taken by the Court of Appeal is right, and that the mere fact of being a signatory to the representation, or one on whose behalf the representation was made, does not override all other considerations of fitness and

(1) [1914] 1 I. R. 113.

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expediency. In other words that all it means is that caeteris paribus the council is to give a favouring consideration to the man's application.

I think, therefore, that the judgment appealed from is right and ought to be affirmed.

LORD ATKINSON. My Lords, this is an appeal from an order of the Court of Appeal in Ireland, dated February 6, 1914, whereby a judgment of the Master of the Rolls in Ireland was reversed and the action of the plaintiff dismissed with costs. The action so dismissed was brought to recover damages for the breach by the respondents of a duty alleged to be imposed upon them by sub-s. 2 of s. 29 of the Labourers (Ireland) Act, 1906 (6 Edw. 7, c. 37).

The breach complained of consisted in this, that the respondents had let to one Joseph Kennedy instead of to the plaintiff himself a certain cottage with a plot of ground attached, which cottage had been erected under a scheme passed by the respondents for the improved housing of agricultural labourers in the Anny electoral division of the Cootehill (No. 2) Rural District. The relief prayed for in the statement of claim was (1.) a declaration that the plaintiff was entitled in preference to the said Joseph Kennedy (on whose behalf no representation had been lodged) to be admitted as tenant to this cottage on the first letting thereof; (2.) to be put into possession of this cottage and the attached plot upon signing the usual contract of tenancy; (3.) an injunction restraining the respondents from letting, attempting or continuing to let this cottage and plot to any person other than the plaintiff; (4.) an injunction to compel the respondents to let the same to the plaintiff, and for that purpose to do all necessary acts; (5.) damages; (6.) further relief.

This relief is based upon the absolute right of the plaintiff to obtain, as tenant, possession of this particular cottage, and to have Kennedy evicted therefrom. His right to have that particular relief was the right alleged to have been violated, and unless the respondents were, in the circumstances disclosed in the case, under a statutory duty to accept him as tenant of the particular cottage, he had no right whatever to obtain either

the injunction he asked for or to recover damages. In the result the Master of the Rolls did not grant an injunction, but awarded the plaintiff 30*l.* damages, without, as far as I can see, a particle of proof that the plaintiff had, by reason of the respondents' alleged breach of duty, sustained any estimated damage whatever.

It is right to point out that the statement of claim contains no averment whatever that the respondents acted fraudulently or corruptly, or in any respect mala fide, and it cannot be permitted that, in argument, the plaintiff should, through his counsel, insinuate what he has not dared positively to assert. There is no proof of any mala fides on the part of the respondents; and it has been recently decided in your Lordships' House that it must be presumed in the case of public bodies, such as these, that they have acted bona fide till the contrary be proved. It has, however, been averred in the statement of claim that this Joseph Kennedy was not an agricultural labourer within the definition contained in the Labourers Acts. That was traversed in the defence. Three witnesses have given evidence in support of this traverse, and the Master of the Rolls, who saw and heard the witnesses, in speaking of Kennedy, says: "This man, who is also an agricultural labourer, is not one of those by whom, or on whose behalf, the representations were made which led to the improvement scheme. He was, in fact, a stranger to it, and may, so far as the scheme is concerned, be described as a complete outsider."

With all respect to the learned Master of the Rolls, this last sentence is, in my view, somewhat misleading. Kennedy possessed the only qualification needed to be accepted as a tenant of one of these cottages, i.e., that he was an agricultural labourer (see s. 13, Labourers (Ireland) Act of 1883, and s. 16, Labourers (Ireland) Act of 1885). There is nothing in these Acts requiring that an applicant for a cottage should be connected with the promotion of the scheme or should be resident in or connected with the area it covers.

Prior to the year 1883 many attempts had been made to provide for the proper housing of agricultural labourers in Ireland. They proved to a great extent abortive. The Act of

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1883 inaugurated a new system. It threw upon the sanitary authority in rural areas, then the board of guardians, now the district councils, the duty of solving the problem. These bodies were, however, only called upon to act, or were only justified in acting, when a representation had been made to them (s. 4 of the Act of 1883). Elaborate provision was made in the following section, s. 5, now repealed, as to the form and contents of this representation. One of these requirements was that the representation should define the section to which the scheme was to apply, and contain a suggestion on the part of the signatories as to the locality or localities most suitable for the erection of the new dwellings.

It has been held that unless these sites are indicated the representation is invalid. But all that has been changed by the statute of 1906.

A district council may now make an improvement scheme under these Acts for the whole or any section of their district without having received any representation whatever in relation to it (s. 3 of the Act of 1906). And a representation will be sufficient for all purposes if it should merely represent that the circumstances of the portion of the rural district to which it relates are such that it is the duty of the district council to take therein proceedings under the Labourers Acts. Representations, therefore, are no longer the necessary preliminaries to action. All suggestions as to sites are surplusage. It is quite true that the form of representation to be found in the schedule to the rules made under the Act of 1906 contains a suggestion such as is required by the Act of 1883, s. 5. But the use of these forms is not obligatory (r. 2), and the suggestion has no binding force whatever. It does not mark out a particular cottage for the use of any one. In fact, the representation does little more than call the attention of the council to a particular state of things so that they may investigate them and find a remedy if needed.

Now, in the present case seventy-four representations were sent in dealing with seven electoral divisions (twenty-one of which related to the Anny electoral district), and at the meeting of the district council on May 17, 1907, the scheme prepared by their clerk for the building of fifty-one cottages

and the acquisition of fifty-one plots, twelve allotments, and twelve allotments for cottages not belonging to the council, was adopted. Amongst these seventy-four were two dealing with a farm twelve acres in extent belonging to a farmer named James Carey, situate in the townland of Aughnamullen, the one suggesting that a cottage with a suitable plot attached should be built on the farm for the appellant, and the other making a similar suggestion in favour of one Patrick Clarke.

The inspector of the Local Government Board thought, apparently, that it was unreasonable to build two cottages on such a small farm, and only recommended the erection of one cottage upon it. And ultimately the Board approved of a scheme for the erection of twenty-five cottages in all. No particular cottage was designated for the appellant in this order, nor was any right or privilege mentioned in it as belonging to him. This was as it should be, since it is the function of the district council, not of the Local Government Board, to select the tenants of the cottages they build. By the month of July, 1912, five of these cottages, including that on Carey's farm, had been completed, and three more were in course of erection. Before August 2, 1912, Clarke had left the county and emigrated to America. He no longer sought to be accepted as a tenant of any cottage.

This James Kennedy, who resided within the rural district of Cootehill (No. 2), had, in fact, sent in a representation that a cottage might be built for him in the Anny electoral division, but that cottage was not included in the scheme ultimately approved of. He accordingly, by letter, applied to be put into possession of the cottage built on Carey's land, as did also the appellant. At the meeting of the respondent council held on August 2, 1912, the letting of this cottage for the first time was taken into consideration. The appellant appeared in person to support his application, and the following resolution was carried:—

"Seconded by Mr. R. Harrison—That Joseph Kennedy of Corfad be given the labourer's cottage in the townland of Aughnamullen in so far as he is a married man with a wife and family and a bona fide labourer in the union of Cootehill, the

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other applicant being a single man and not residing in the union. Which was carried that J. Kennedy get the cottage by 6 to 4, he attending on Tuesday 6th inst. to sign bond and get key."

Kennedy on the same day entered into an agreement with the respondents to become tenant of the cottage with the attached plot at a rent of 1*s.* 3*d.* per week, and was put into possession.

The reason given for selecting Kennedy as the tenant rather than the appellant, who is the other applicant referred to in the resolution, may have been a good or a bad reason, but there is nothing to show that the respondents did not think it was a good and valid reason, and did not act honestly and without prejudice in passing the resolution, and, moreover, abundant evidence was given before the Master of the Rolls that Kennedy's house was in a most insanitary condition, that the appellant lived with his brother in a house which was not insanitary, was himself unmarried, and had no special need at the moment of a cottage of his own. In addition two of the members of the council had visited Kennedy's cottage and seen its condition. The respondents in the sixth paragraph of their defence aver that they have been always ready and willing to give to the plaintiff a preference in the letting of the cottages comprised in this scheme, and to make a letting to the plaintiff of another of these cottages with an allotment attached on completion.

Sect. 29 of the Act runs as follows:—

"(1.) The district council shall make regulations with respect to the letting of cottages and allotments under the Labourers Acts, and for preventing any undue preference in the letting thereof, and generally for carrying the provisions of the said Acts into effect.

"(2.) Regulations under this section shall provide that, on the first letting of any cottages or allotments comprised in a scheme, preference shall be given to agricultural labourers who have signed on their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made."

The only regulations made under this section were not approved

of by the Local Government Board till September 16, 1912, and did not therefore come into force till that date; but it is clear that whatever regulations might be made under this section, they could not confer upon a person on whose behalf a representation was made a greater right or privilege than that which the statute itself would authorize.

It has in the proceedings in this case been assumed that it is the section of the Act itself, not the regulations made under it, which confers these rights and privileges. It has been so decided in the case of *Tevlin* v. *Lisnaskea Rural Council.* (1) It is more satisfactory under these circumstances to assume, in the present case, that this is the correct construction of the statute. I confess, however, for myself that this view appears to me very questionable. It is no doubt quite true that the district council should not be permitted by their neglect or omission to make regulations to defeat the right of the persons by whom or on whose behalf a representation has been made; but the answer to that is that the council can, by proper proceedings, be compelled to discharge their duties in this regard and to make regulations. I express no definite opinion upon this point (it is not necessary to do so in this case), but hold myself entirely free to consider it on a future occasion.

Now the agricultural labourers, by whom or on whose behalf a representation is made, styled in the argument for convenience' sake by the rather ineuphonious name of representators, are no doubt a small class, ascertained or readily ascertainable; a certain privilege is conferred upon them exclusively, and a duty towards the members of the class is imposed upon district councils different from that which the councils owe to the members of the general public.

It may well be that by reason of this fact a member of this class is entitled to sue a council in respect of their breach in his regard of this special duty, but the important question remains, what is the true nature and precise extent of this special duty so imposed? First of all the representators are neither on the first occasion of letting the cottages built under a scheme nor on any subsequent occasion entitled to an undue

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preference. For instance, the mere fact that a representation had been made by or on behalf of a certain agricultural labourer who might already be well housed, might be of dissolute habits, and inefficient as an agricultural labourer, could not per se, I think, entitle him to have his claim to a certain cottage acceded to in preference to the claim of a competitor who was of regular habits, was a more efficient agricultural labourer, and who and whose family were housed, to the danger of their health, in an insanitary dwelling. That would be, having regard to the whole object and purpose of these Labourers Acts, to give to the representator an undue preference, the very thing that must not be done.

The preference, therefore, which the district council is, under sub-s. 2, bound to give to the class of representators on the occasion of the first letting of any cottages or allotments under a scheme, must be something less than, and different from, an undue preference; and, speaking for myself, I confess I have great difficulty in seeing how a preference would, in any particular case, not be undue where the claims of the representator as an agricultural labourer to be adequately housed were inferior to those of a like character of one of his competitors who was not a representator.

In an individual instance a preference given to a representator over a non-representator caeteris paribus would appear to me to be a due preference, but caeteris imparibus an undue one. I think, moreover, that it must be left to the district council in each case, in the unprejudiced, honest, and bona fide exercise of their functions, to decide upon the merits, of the above mentioned character, of the respective applicants. The proper administration of these statutes by district councils would, I think, be impossible, and, indeed, their object would be to a great extent defeated, if the mere fact that a representation was sent in by or on behalf of a certain agricultural labourer, with or without a suggestion in his favour, was to prevail over every other consideration, and secure for him the tenancy of a particular cottage, or, indeed, I think, of any cottage built under a scheme, no matter how strongly these other considerations might preponderate in favour of a competitor who happened not to be

a representator. This sub-s. 2 of s. 29 was designed no doubt to encourage agricultural labourers to make, or have made on their behalf, representations, but that should not be permitted to defeat the main and paramount purpose and object of the whole code of Labourers Acts, namely, to provide for the adequate housing in each rural district of agricultural labourers sufficient for the needs of that district. While if the rural district council were bound to give to the representator in any given case the particular cottage he represented should be built, or suggested should be built for himself, their functions would become purely mechanical, and would be simply limited to registering, and as executive officers carrying out, the wishes of the representators, even though they might be thoroughly convinced that the preference they thereby gave was unjust, unreasonable, and injurious, and I think, therefore, necessarily undue.

I quite concur with Holmes L.J. in thinking that one is not forced to adopt a construction of s. 29 which would lead to such results while its language is open to another construction.

In my opinion, therefore, the appellant's action, which is solely based upon the alleged statutory duty of the district council to have accepted him as tenant of the particular cottage built under the scheme on Carey's land, wholly fails. The district council owe the appellant no such duty. No right of which that duty is the correlative is conferred upon him.

I accordingly think that on this ground by itself the judgment appealed from was right, and that this appeal should be dismissed on the terms usual in such cases. Upon the question of damages I wish to say that I presume the possession and enjoyment of a cottage, such as that built on Carey's land, with the proposed allotment attached, at the low rent of 1*s.* 3*d.* per week or 3*l.* 5*s.* per annum, precarious as the tenure is, and stringent as are the covenants into which the tenant must enter, may be a thing of some value. If it were not, then the appellant, by his rejection, has suffered no loss and has no right of action for the breach of a statutory duty. The loss, if any, should be proved.

The letting cannot, under the 13th section of the Act of 1883, be made for a longer term than from month to month. The tenant cannot sub-divide, sub-let, or assign the tenement or

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any portion of it; he cannot let in conacre any part of the lands allotted to him; he cannot allow any part of the tenement to be occupied by a lodger, and on the breach of any one of these conditions the district council are bound to evict him by the cheap and easy process prescribed for the eviction of cottier tenants under ss. 81 to 89 of the Landlord and Tenant (Ireland) Act, 1860.

According to the form prescribed in r. 42 of the Rules passed under the Act of 1906, the letting is only to be made from week to week. In obedience to that rule, the cottage was let to Kennedy only from week to week. The tenant is no doubt liable to the payment of all rates and taxes, but upon what principle the Master of the Rolls, in the absence of all specific evidence on the point, came to the conclusion that the loss sustained by the plaintiff in respect of his not being accepted as tenant in preference to Kennedy amounted to 30*l.*, over nine years' purchase of his rent, I am at a loss to understand. I concur with Holmes L.J. in thinking that the delay by the district council in carrying out this scheme was, in reality, due to the inadequacy of the sum they could obtain to finance it. No other motive or object is proved. If they have improperly delayed they can be compelled by due process of law to proceed. The case of *Condon* v. *Mitchelstown Rural District Council* (1) was, I think, rightly decided, and I concur with Holmes L.J. in thinking that it is open to doubt whether such questions as were raised in *Condon's Case* (1) can be raised legitimately until the whole scheme has been carried out, or at least until a remnant of the cottages has been left untenanted inadequate, owing to the acceptance of non-representators as tenants, to meet the claims of suitable and meritorious representators. It is not necessary in the present case to express any opinion upon that question.

LORD PARKER OF WADDINGTON. (2) My Lords, this case turns upon the proper construction to be given to the 29th section of the Labourers (Ireland) Act, 1906, which provides (in sub-s. 1) that—

"The district council shall make regulations with respect to

(1) [1914] 1 I. R. 113. (2) Read by Lord Parmoor.

the letting of cottages and allotments under the Labourers Acts, and for preventing any undue preference in the letting thereof, and generally for carrying the provisions of the said Acts into effect,"

and sub-s. 2 that—

"Regulations under this section shall provide that on the first letting of any cottages or allotments comprised in a scheme preference shall be given to agricultural labourers who have signed on their own behalf the representation on which the scheme was founded or on whose behalf that representation was made."

No such regulations are to be of any force until confirmed by the Local Government Board.

In the present case the plaintiff complains that in letting a certain cottage comprised in a scheme under the Act the defendants have not given him the preference to which the Act entitles him. It appears, however, that at the date of the letting no such regulations as provided by the 29th section had been confirmed by the Local Government Board. If, therefore, the plaintiff has any cause of complaint it can only be on the footing, (1.) that the regulations, if and when made and confirmed, must confer a preference in the precise words of s. 29, sub-s. 2, and (2.) that the action of the defendants has violated the preference created by these words.

My Lords, without expressing any opinion on the point, I will assume that the regulations, if made, must have conferred a preference in the precise words of s. 29, sub-s. 2. Even so, however, I doubt whether the preference conferred is an absolute preference, or a preference only when other matters are equal. It is not contended, and could not, I think, be contended, that every labourer by or on whose behalf a representation was made is entitled to rent any particular cottage comprised in a scheme. It is, however, possible, and this was the construction for which the appellant's counsel contended, that all labourers by whom or on whose behalf representations have been made are as a class entitled to an absolute preference over labourers by whom or on whose behalf no representations have been made. I will again assume this contention is correct, though I prefer to reserve my opinion on the point. On this assumption the plaintiff is claiming

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damages for disregard on the part of the defendants of a preference to which he is entitled, not individually, but only as a member of a preferred class, and a little consideration will, I think, show that no such action is maintainable. Suppose that the scheme provides for the erection of six cottages and that there are six labourers by or on whose behalf representations have been made. When the first cottage is erected and has to be let the six labourers as a class will be entitled to a preference over any labourer not a member of the class. If the district council propose to let the cottage to a person who is not a member of the class it will be proposing to act in contravention to the Act, and might possibly be restrained by injunction, but if it actually did let the cottage to a person who was not a member of the class no member of the class could prove that he was individually damaged. For non constat that the district council, if they had acted in accordance with the section, would have let to him rather than to any other member of the class. It is not even clear that any single member of the class would be damaged, for if any one member, when the time came, did not desire to rent a cottage there would still be enough cottages for the other members. The same difficulty may be seen on examining the order made in this case by the Master of the Rolls. He declared that the appellant was entitled to the cottage in question as against the person to whom the cottage was actually let, and who was not a member of the preferred class, and he awarded 30*l.* damages. It is clear, however, that if such declaration was right, every member of the preferred class was entitled to a similar declaration and, if damage could be properly awarded, was entitled to similar damages; and this would be an absurd result.

For these reasons I think that the appeal fails and should be dismissed.

LORD SUMNER. My Lords, I agree, and after the exhaustive examination of this case by my noble and learned friend Lord Atkinson I have but little to say.

The defendants must be deemed in the plaintiff's favour to have made regulations adequate to give effect to s. 29. Their failure to do so cannot prejudice him. I will assume that such

regulations, giving effect to sub-s. 2, would run in the very words of the statute, though clearly other words might be used, and more than one way of giving effect to it might be found. The plaintiff could then truly say that on the occasion of the first letting of a cottage comprised in the scheme, he, on whose behalf the representation on which the scheme was founded had been made, was not preferred to Kennedy, an agricultural labourer, on whose behalf such representation had not been made. So far, I am inclined to think, his action would not be premature though his damages might be nominal only.

Would this be enough? I think not. He must further establish that he was, under the circumstances, entitled to be preferred absolutely. I take this to be so, because the grounds given for letting the cottage to Kennedy were certainly such as the local authority might act on in their discretion, if they had any under the section, since their good faith is not now impugned.

If the Act intended to give to such persons as the plaintiff an absolute right to be preferred in such circumstances, I think that the natural way of doing so would have been (1.) by way of direct enactment, binding the authority immediately, instead of by prescribing the purport of certain regulations to be made by that authority, so as to bind itself; and (2.) by expressly enacting that, on the first letting of any cottage, the tenancy itself should be given to such a person as the plaintiff, if any, and not a mere preference in giving the tenancy.

This is not conclusive, but I think it becomes so on considering the word "preference." In connection with the performance of an administrative act the word "preference," as applied to the doing of the act, normally imports a choice to do or not to do it, which resides in the administrator, albeit subject to limitations.

This clearly is so under sub-s. 1. The authority, which must make regulations under which it will be impossible for it to be guilty of undue preference in letting, obviously is free to give effect to a preference when it is not undue. Sometimes some one must choose; at such times the defendants have to choose, subject to the regulations. If in sub-s. 1

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"preference" implies some choice on the defendants' part, and therefore some falling short of an absolute right to be preferred on the plaintiff's part, why should it be otherwise under sub-s. 2? If an absolute preference were prescribed under sub-s. 2, no doubt it would not offend against regulations made to satisfy sub-s. 1, for, being prescribed, it could not be undue, but in the absence of some qualifying and limiting adjective I cannot, at any rate in such a context, read "preference" as prescribing something absolute and as precluding any element of choice in the authority which has to prefer. The Legislature requires of the local authority impartial administration. By sub-s. 1 it bars the local authority's favourites; by sub-s. 2 it recommends its own. When it desires to enact an order of precedence, it has in s. 7 of the Labourers (Ireland) Act, 1896, a model of the natural way in which to do so.

LORD PARMOOR. My Lords, the appellant brought an action against the respondents asking inter alia for a declaration that the plaintiff is entitled, in preference to one Kennedy, or other person on whose behalf no representation was lodged, to be admitted by the respondents as tenant, upon the first letting of a certain labourer's plot and cottage erected by the respondents, pursuant to the Labourers (Ireland) Acts, 1883 to 1906, being plot No. 52, Ordnance Survey 23, on the deposited maps, and to be put into possession of the said plot, and for damages. The learned Master of the Rolls held that the appellant was entitled to the declaration; that he would make no order as to the possession of the said plot and cottage; and that the plaintiff was entitled to the sum of 30*l.* damages. This order was reversed in the Court of Appeal.

The Master of the Rolls came to the conclusion that the respondents had acted perversely, and with a desire to take an advantage of what was their own default or breach of duty, to enable them to allot the cottage to Kennedy rather than to the appellant, but, in my opinion, the evidence fails to establish any such case, and I think it right to express my entire agreement in this respect with the judgment of Holmes L.J.

The question to be decided depends upon the construction of

s. 29, sub-ss. 1 and 2, of the Labourers (Ireland) Act, 1906. In sub-s. 1 the district council has a duty to make regulations with respect to the letting of cottages and allotments under the Labourers Acts, and for preventing any undue preference in the letting thereof, and generally for carrying the provisions of the said Acts into effect. In sub-s. 2 it is enacted that the regulations under the section shall provide that, on the first letting of any cottages or allotments comprised in a scheme, preference shall be given to agricultural labourers who have signed on their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made.

No regulations had been sanctioned by the Local Government Board when the appellant applied for the cottage in question, but it is unnecessary to express an opinion whether, in the absence of regulations, the action is competent, since I am clearly of opinion that the appellant fails on other grounds. The appellant was a representator, and, therefore, entitled to the benefit of preference in accordance with sub-s. 2 of s. 29. Sub-s. 2 does not give a right to a particular cottage, and I hold that the case of *Condon* v. *Mitchelstown Rural District Council* (1) was rightly decided. If the appellant has no right to a particular cottage it is difficult to see what damage he would sustain, and in the present case the appellant has given no proof of having sustained any damage whatsoever. A further point was much discussed during the argument before your Lordships' House on the construction of sub-s. 2 of s. 29. It was argued on behalf of the appellant that the preference to be given to agricultural labourers who are representators was a mechanical preference, and that under no circumstances was any discretion left with the district council. I do not construe the sub-section in this way. No doubt the section directs that a preference shall be given to the representators, but this does not deprive the district council of all discretion or make it impossible for them to consider the exceptional claims of a competing candidate. If there is such a discretion, the method of its exercise is for the district council, so long as they act bona fide. It is obvious that there were strong reasons in the present case for giving the cottage to

(1) [1914] 1 I. R. 113.

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Kennedy. I agree with the decision of the Court of Appeal, and think that the appeal should be dismissed.

Order of the Court of Appeal in Ireland affirmed and appeal dismissed.

Lords' Journals, March 25, 1915.

Solicitors for appellant: *Munton, Morris, King, Gavan Duffy & Co., for Blood Smyth & Co., Cootehill.*

Solicitors for respondents: *Ellis, Munday & Clarke, for Charles E. Murphy, Dublin.*

[HOUSE OF LORDS.]

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LARKIN AND OTHERS . . . . . APPELLANTS;

AND

LONG . . . . . RESPONDENT.

Trade Union—Conspiracy—Procuring Breach of Contract of Employment—Dispute between Employer and other Employers—Intervention of Workmen's Union—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 3; *s.* 5, *sub-s.* 3.

The plaintiff was a stevedore, who, in order to carry out his contracts for the discharge of cargoes, hired dock labourers, all or most of whom were members of a trade union known as the Irish Transport Union. The other stevedores of the port agreed to form an employers' association called the Stevedores' Association for the purpose of obtaining higher rates from the shipowners, but the plaintiff refused to join the association. This association was promoted by the secretary of the Irish Transport Union with a view to the improvement of the conditions of employment amongst the dock labourers, and he promised the association that he would see that no union man worked for any stevedore who was not a member of the association. In an action of conspiracy by the plaintiff against three officials of the Transport Union and three members of the Stevedores' Association, the jury found that the defendants agreed to force the plaintiff to join the Stevedores' Association and used threats for that purpose; that in pursuance of this agreement the defendants procured dock labourers who were working for the plaintiff to break their contracts with him and leave his employment, thereby causing actual money loss to the

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* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

plaintiff; that at the time of the acts complained of there was no dispute between the plaintiff and the dock labourers, but that there was a dispute between the plaintiff and the Stevedores' Association into which the association brought the officials of the Transport Union to assist:—

Held, that the acts of the defendants were not done in contemplation or furtherance of a trade dispute within the meaning of the Trade Disputes Act, 1906, and were actionable.

Decision of the Court of Appeal in Ireland [1914] 2 I. R. 285 affirmed.

APPEAL from an order of the Court of Appeal in Ireland affirming an order of the Divisional Court. (1)

The appellant Larkin was the organizing secretary, and the appellants Hopkins and Redmond were delegates, of an association of dock labourers known as the Irish Transport and General Workers' Union, which was founded in 1904. The respondent, Matthew Long, was a stevedore at the port of Dublin.

The respondent brought an action against the appellants and three other defendants, Newman, William Long, and Donohoe, who were members of an association of employers called the Stevedores' Association, for damages and an injunction in respect of an alleged conspiracy on the part of the defendants to procure and induce the plaintiff's labourers to leave his employment.

The action was tried before Palles C.B. and a special jury, and upon the findings of the jury the learned judge entered judgment for the plaintiff for 200*l.* and granted an injunction.

An application by the defendants for judgment or a new trial was refused first by the Divisional Court and afterwards by the Court of Appeal. The officials of the workmen's union appealed to this House. The other defendants did not appeal.

The plaintiff had been a stevedore in the port of Dublin for many years. He had never had any dispute with his men or with the Irish Transport and General Workers' Union and he had always paid the highest rate of wages. Until 1912 there had been no stevedores' association in the port. In June, 1912, the Irish Transport and General Workers' Union proposed a change in the conditions of employment of labour in the port of Dublin with a view to procuring the employment of a larger number of

(1) [1914] 2 I. R. 285.

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men in the discharge of a ship, and the Dublin stevedores were invited by circular to meet representatives of the Transport Union on June 10 at Liberty Hall, the headquarters of the union, to discuss the matter. The plaintiff attended this meeting. Larkin submitted to the stevedores a manuscript list of new prices for labourers in some branches of the stevedoring business. Some of the stevedores objected that they could not pay the proposed rates of wages owing to the undercutting of prices due to competition amongst themselves. Larkin then suggested that the stevedores ought to form an association to protect themselves against the shipowners. No decision was arrived at and the meeting was adjourned. At the adjourned meeting, held on June 18, which the plaintiff also attended, a proof of the new list of prices was produced and discussed. The plaintiff informed the meeting that the list did not affect his business as the rate of wages and terms of employment were the same as those then current in his business, and he took no further interest in the matter and attended no further meetings. He first became aware that the Stevedores' Association had been formed on July 24, 1912, from his brother William Long, who showed him the list of rates that the stevedores had drawn up to charge to the shipowners, and told him that he had been sent by Newman to give him the list. William Long then asked the plaintiff to join the association and, on the plaintiff's refusal, told him that unless he joined and charged the same rates he would get no men to work for him, as they (the stevedores) had made an arrangement with Larkin not to allow the men to work. The plaintiff replied that he had no dispute with his workmen and that it was none of Larkin's business. William Long then said "That is all nonsense. What is it Larkin cannot do?"

On July 27 the plaintiff met Newman, William Long, and Donohoe in Dublin. Newman asked the plaintiff what he was going to do, and he replied that he had made up his mind not to join the association. Newman then warned the plaintiff that he would not get men to work for him, as Larkin had promised to assist the association in every way and to withdraw men from the plaintiff unless he joined. On the same evening Hopkins

told the plaintiff that Larkin wanted to see him, and he went to Liberty Hall, but did not see Larkin. On August 6 a meeting was held of the Transport and General Workers' Union, when the attitude of the plaintiff in refusing to join the Stevedores' Association was discussed, and eventually the meeting was adjourned. The adjourned meeting was held on August 7, and it was then resolved that members of the union should not be allowed to work for the plaintiff and that the union officials be instructed to that effect. On the same day, August 7, the *Sieben Jarl* arrived at the port, and on that evening Redmond told the plaintiff that Larkin wanted to see him. The plaintiff saw Larkin, who told him that he had arranged with the stevedores to assist them in every way and to withdraw the men from the plaintiff unless he joined the association. The plaintiff had engaged thirty-three men to discharge the *Sieben Jarl*, and the work of discharging was begun at 6 A.M. on August 8. At 7.15 A.M. Hopkins and Redmond, acting under Larkin's directions, came down to the ship and ordered the men off, and told the plaintiff that he would be further stopped unless he joined the association. The men thereupon ceased work and reported themselves at headquarters.

On August 19 the plaintiff issued the writ in the action. On two subsequent occasions, namely, on August 22 and September 23, Hopkins prevented the plaintiff from discharging ships by calling off the men he had engaged.

The statement of claim was delivered on October 21, 1912. The plaintiff thereby alleged that in the course of his business he entered into contracts with shipping agents for the discharge of cargoes from vessels arriving in the port, and that for the purpose of executing those contracts he employed a class of workmen known as dock labourers and entered into the usual contracts of employment with them; that in August and September, 1912, the defendants wrongfully and maliciously conspired and agreed to combine amongst themselves and did so combine to procure and induce the aforesaid workmen of the plaintiff to leave his employment and to procure and induce dock labourers and others to refuse to work for the plaintiff; that in pursuance of the said conspiracy the defendants did in fact

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procure and induce workmen of the plaintiff to leave his employment and procure and induce dock labourers and others to refuse to work for the plaintiff; and that by reason of the said conspiracy the plaintiff had suffered great loss and damage and had been seriously injured in his trade.

At the trial of the action the statement of claim was, by leave of the Court, amended by the addition of the following paragraph:—

"The defendants wrongfully and maliciously conspired and agreed amongst themselves wrongfully and without legal authority to force the plaintiff to join the Stevedores' Association, which the plaintiff had a legal right to refuse to join. And the defendants in pursuance of the said agreement did by threats and menaces and other unlawful means endeavour to force the plaintiff to join the Stevedores' Association. And in further pursuance of the said conspiracy and agreement did procure certain dock labourers who were willing to work for the plaintiff not to work for him and in further pursuance did induce and procure labourers who had engaged to work for the plaintiff to break their contracts of employment and leave the plaintiff's employment, whereby actual money loss was sustained by the plaintiff."

Separate defences were delivered by the appellants and by the remaining three defendants. The appellants by their defence denied the allegations of a conspiracy and of acts done in pursuance thereof and further denied that the plaintiff had by reason of any acts on their part prohibited by law suffered any damage, and by way of further defence they alleged that at the time the matters complained of in the action were done by them there was a trade dispute in existence and then pending between the plaintiff and the dock labourers of the port of Dublin and the Transport and General Workers' Union on their behalf relative to the wages and the rate of remuneration to be paid by the plaintiff to such labourers for services rendered in discharging and unloading cargoes from vessels arriving at the said port; and that the said defendants as members of the Transport and General Workers' Union, acting on behalf of the dock labourers generally, and with their concurrence, acted as they did in withdrawing dock labourers then in the plaintiff's employment, and in refusing to allow any of such labourers to work for the plaintiff, as they

lawfully might, in contemplation and furtherance of such trade dispute within the meaning of ss. 3 and 4 of the Trade Disputes Act, 1906; and they maintained that the action was unsustainable in law.

The defence of the remaining defendants consisted merely of a traverse of the allegations in the statement of claim.

At the trial the questions left by the Lord Chief Baron to the jury, with their answers thereto, were as follows:—

1. Did the defendants, and if so which of them, agree to force the plaintiff to join the Stevedores' Association? Answer, "Yes, all of them."

2. Did the defendants, and if so which of them, in pursuance of the said agreement, use threats to the plaintiff to force him to join the association?

(*a*) Did William Long? Answer, "Yes."

(*b*) Did Newman? Answer, "Yes."

(*c*) Did Donohoe? Answer, "Yes."

(*d*) Did Larkin? Answer, "Yes."

(*e*) Did Redmond? Answer, "Yes."

(*f*) Did Hopkins? Answer, "Yes."

3. Did the defendants, and if so which of them, in pursuance of the said agreement, induce or procure dock labourers who had engaged to work for plaintiff, and were then actually working for plaintiff, to break their contracts and leave plaintiff's employment on the *Sieben Jarl* on August 8? *Shuna*, August 22? *Thelma*, September 23? Answer, "Larkin, Redmond, Hopkins."

4. Did the said acts cause actual money loss to the plaintiff? Answer, "Yes."

5. Was there, at the time of the acts complained of, a dispute between the plaintiff and the dock labourers? Answer, "No."

6. If so, was it a dispute between the plaintiff and the Stevedores' Association, into which the stevedores brought Larkin, Hopkins, and Redmond to assist? Answer, "Yes."

7. What was the nature of the dispute, was it (*a*) that the labourers insisted that the plaintiff should become a member of the Stevedores' Association and that the plaintiff refused to do so? Answer, "No"; or (*b*) was it the conflicting claims on the one side of the Transport Union to work only for the members

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of a recognized stevedores' association and on the other side to obtain the assistance of union labour in discharging his ships without joining the association? (No answer); or (*c*) was it that the defendants insisted that the plaintiff should pay the same wages and exact the same conditions of employment as the Stevedores' Association had agreed to adopt? (No answer.)

8. If the dispute was (*c*), did the plaintiff refuse to pay the same wages and exact the same conditions of employment as the Stevedores' Association had agreed to? (No answer.)

9. Were the said acts of the defendants done in contemplation or in furtherance of such dispute? (No answer.)

10. Assess the plaintiff's damages:—

(*a*) To August 19 last. Answer, 200*l.*

(*b*) From August 19 to the present time. Answer, 75*l.*

The Lord Chief Baron then pointed out to the jury that they had answered question 3 only in relation to three of the defendants (namely, the appellants), and, notwithstanding the objection of the appellants' counsel, he sent them back to answer the question as regards the other three defendants. In answer to a question by one of the jury whether they had any evidence as regards those three the Lord Chief Baron answered, "If there was an agreement amongst six and three of them do acts in pursuance of the agreement, the acts are the acts of the six." The jury then included the three remaining defendants in their answer to the question.

Upon these findings the learned judge directed judgment to be entered against all the defendants for 200*l.* and costs and granted an injunction restraining the defendants, their servants and agents, from doing any acts in furtherance of the agreement to force the plaintiff to join the Stevedores' Association either by inducing or procuring workmen who entered into contracts with the plaintiff to work for him to break their contracts and to leave the plaintiff's employment in breach of their contracts or otherwise.

The appellants then applied to the Divisional Court for judgment or a new trial on the following grounds:—

(1.) Non-direction and misdirection of the learned judge at the trial.

(2.) That the findings of the jury in answer to questions 1, 2, 3 and 4, submitted to them and upon which the learned judge entered judgment for the respondent, were against the evidence and the weight of evidence.

(3.) That upon the finding of the jury in answer to question 6 the learned judge should in law have entered judgment for the appellants, inasmuch as the said finding entitled the appellants to judgment, and that upon such finding the learned judge should have directed the jury that they should answer question 9 submitted to them in the affirmative.

The other defendants also appealed.

The motion was heard by Gibson, Wright, and Kenny JJ., but Wright J. died before judgment was delivered. Gibson and Kenny JJ. gave judgment in favour of the respondent and refused the motion. It appeared from Gibson J.'s judgment that Wright J. had intimated to the other members of the Court that he thought there was a trade dispute, in furtherance of which the acts complained of were done, and that there should be judgment for the defendants.

The Court of Appeal (O'Brien L.C., Holmes and Cherry L.JJ.) affirmed the decision of the Divisional Court.

1915. March 5, 8. *Serjeant Sullivan, K.C.* (of the Irish and also of the English Bar), and *H. R. Poole* (of the Irish Bar), for the appellants. Three questions are raised by this appeal: (1.) whether Redmond and Hopkins were justified in ordering the plaintiff's men to cease work; (2.) whether the plaintiff suffered any damage thereby; (3.) whether the appellants are exempted from liability by the Trade Disputes Act, 1906. The appellants admit that on the findings 3 and 4 of the jury they could not resist the action, apart from the Trade Disputes Act, 1906: *Conway* v. *Wade* (1); but those findings are against evidence. There was here no unlawful combination amongst the defendants. That depends upon the object of the defendants in compelling the plaintiff to join the Stevedores' Association. If the object of the defendants was not the injury of the plaintiff but the furtherance of their trade interests, that

(1) [1909] A. C. 506, at p. 510.

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was perfectly legitimate. A combination to secure a monopoly necessarily involves the prevention of other persons from carrying on that trade; but although injury may result to those persons, no action for conspiracy will lie if the object is to improve the trade and not to injure others. This test applies equally whether it is a combination of men or of masters: *Ward, Lock & Co.* v. *Operative Printers' Assistants' Society* (1); *Bulcock* v. *St. Anne's Master Builders' Federation.* (2) Here the object of the defendants in compelling the plaintiff to join the Stevedores' Association was to find employment in the trade for as many union men as possible. *Quinn* v. *Leathem* (3) differs from the present case in almost every particular; the combination, the acts done, and the end sought to be achieved were all different in character. There were here no threats and intimidation such as existed in that case.

[LORD ATKINSON referred to *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales.* (4)]

Assuming that there was here a breach of contract induced by the defendants, there was a sufficient justification for the defendants' interference, and further that was not the cause of the loss to the plaintiff. The contract of the plaintiff with the shipowner was an entire contract to discharge the ship, but dock labourers are employed by the half-day, and the damage to the plaintiff resulted not from the men's leaving in the middle of a shift, but from their refusal to re-engage themselves to hire for the discharge of the ship. *Lumley* v. *Gye* (5) therefore has no application. Lastly, the Trade Disputes Act is an answer to the action inasmuch as the acts complained of were done in furtherance of a trade dispute. It is said that there was no dispute between the plaintiff and his workmen and that the only dispute was between the plaintiff and his fellow stevedores. That is a denial of every fact proved in the case. If there was no dispute with the workmen, why did the plaintiff not discharge his ships? From start to finish it was a dispute with the workmen. It is too late now to say that the officers of a trade union do not represent the workmen. The workmen elect their officers and trust them to think

(1) (1906) 22 Times L. R. 327.
(2) (1902) 19 Times L. R. 27.
(3) [1901] A. C. 495.
(4) [1902] 2 K. B. 88, 732.
(5) (1853) 2 E. & B. 216.

for them. The Transport Union represents the dock labourers. The fact that the workmen have no quarrel with the individual employer when he is doing a thing which the trade union has warned him not to do is nihil ad rem. In a secondary strike the men have never any quarrel with the particular master. Before the men ceased work a resolution had been passed by the union and the men were notified by the officers of the union. As soon as the men got the message from the executive to cease work there was a trade dispute. Larkin's position was that an association of stevedores was necessary to enable him to secure the terms he wanted for the men. The be all and end all of the dispute was the benefit of the men.

[They also contended that the Lord Chief Baron had wrongly allowed the statement of claim to be amended at the trial; that he had wrongly refused to accept the original finding of the jury on question 3 and had in sending back the question misdirected the jury as to the evidence; and that, having regard to the character of the action, the inclusion of the other defendants in the finding on that question was a matter which prejudicially affected the appellants' case.]

J. H. Campbell, K.C., *T. Healy, K.C.*, *H. Hanna, K.C.*, and *K. B. Dockrell* (the two former of the Irish and also of the English Bar and the two latter of the Irish Bar), for the respondent, were not called on.

The House took time for consideration.

April 29. LORD ATKINSON. My Lords, this is an appeal against an order of the Court of Appeal in Ireland, dated December 19, 1913, affirming an order of the King's Bench Division of the High Court of Justice in Ireland dated June 7, 1913.

By this latter order the application of the six defendants in the action to have the judgment entered for the plaintiff, the present respondent, dated December 6, 1912, set aside, and judgment entered for the defendants, or in the alternative for a new trial, was refused with costs.

Three of the defendants, namely, William Long, Newman, and

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Donohoe, are members and officials of a certain trade union or association of stevedores styled the Stevedores' Association. Stevedores are employers of labour. Their business is to load and discharge ships for reward paid by the owners of the ships, and the staff which they hire for this work are dock labourers.

In Dublin these dock labourers are all members of a trade union styled the Irish Transport and General Workers' Union, of which Larkin is the secretary and Redmond and Hopkins are officials. Larkin desired to get more favourable terms for the members of his association from the stevedores of the port. The stevedores represented to him that the remuneration they received from the shipowners for their work was not sufficient to enable them to comply with this demand, and at Larkin's suggestion the great body of the stevedores entered into this trade union association, the policy and object of which was to secure for themselves increased remuneration from shipowners by refusing to work at any scale less than that which they themselves had adopted.

Matthew Long never had any dispute with his dock labourers. He refused to join the association. Severe and illegitimate pressure was put upon him to force him to do so, and on August 19, 1912, he instituted the action against the six defendants out of which this appeal has arisen, claiming damages and an injunction. His cause or causes of action are succinctly set forth in the third paragraph of the original statement of claim. It runs thus:

"3. In or about the months of August and September, 1912, the defendants wrongfully and maliciously conspired and agreed to combine amongst themselves and did so combine to procure, cause, and induce the aforesaid workmen of the plaintiff to leave his employment and abstain from continuing therein, and did further procure, cause, and induce dock labourers and others to refuse to work for the plaintiff. In furtherance and pursuance of the said conspiracy the defendants did in fact procure, cause, and induce workmen of the plaintiff to leave his employment and abstain from continuing therein and did further in fact procure, cause, and induce dock labourers and others to refuse to work for the plaintiff."

It will be observed that the object of the conspiracy is alleged to have been, first, to induce the plaintiff's workmen to leave his employment and, second, to induce dock labourers and others not to work for him, the overt acts being that they in fact induced his workmen to leave his employment, and in fact procured the dock labourers and others not to work for him.

I think it is rather unfortunate that the trial did not proceed upon the pleadings as they stood. Having regard to the evidence given, questions might, I think, have been framed for the jury upon them somewhat similar to questions 2 and 3 framed in *Quinn* v. *Leathem*. (1) However, at the instance of counsel for the plaintiff, an amendment to the statement of claim was, by the leave of the judge, made at the trial, which, while by no means improving the pleading, accounts for the form in which the questions ultimately left to the jury were, in fact, framed. The amendments run thus:

"The defendants wrongfully and maliciously conspired and agreed amongst themselves wrongfully and without legal authority to force the plaintiff to join the Stevedores' Association, which the plaintiff had a legal right to refuse to join.

"And the defendants in pursuance of the said agreement did, by threats and menaces and other unlawful means, endeavour to force the plaintiff to join the Stevedores' Association. And in further pursuance of the said conspiracy and agreement, did procure certain dock labourers who were willing to work for the plaintiff not to work for him, and in further pursuance did induce and procure labourers, who had engaged to work for the plaintiff, to break their contracts of employment and leave the plaintiff's employment, whereby actual money loss was sustained by the plaintiff."

The first and second questions were left by the Lord Chief Baron, who tried the case, to the jury to deal with the first and second paragraphs of this amendment, the third with the last portion of it.

I do not think it is at all necessary to embark on a critical examination of the authorities dealing with the law touching actions for conspiracy, for the simple reason that, the quantum

(1) [1901] A. C. 495.

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of the damages not being objected to, the inducing of a servant or workman to break his contract with his master is an actionable wrong against that master, whether committed by one or many persons, and whether committed in pursuance of a malicious conspiracy to injure the master, or committed deliberately and maliciously but with no more concert or agreement than is usually involved in almost all joint wrong-doing. In *Lumley* v. *Gye* (1) the wrong sued for was committed by the defendant acting alone. He, unaided, succeeded in persuading Miss Wagner not to sing at the Queen's Theatre. I think there was ample evidence to sustain the findings of the jury on questions 1 and 2. In answer to the third question, taken in connection with the answer to question 1, the jury in effect found that the six defendants, in pursuance of an agreement to force the respondent, Matthew Long, to join the Stevedores' Association, induced and procured certain dock labourers, who had engaged to work for him, and were actually working for him in discharging a ship called the *Sieben Jarl*, to break their contracts and leave his employment.

I did not understand that it was seriously contested—it could not, I think, be successfully contested—that there was not ample evidence to sustain this finding. Of course, it must be confined to what took place before the writ was issued.

Much of the argument devoted to this question was directed rather to show that, owing to the terms of the contract of hiring entered into between the respondent and his dock labourers, the amount of damage found could not have accrued from this tortious act. I do not think it is at all clear, however, upon the evidence, what has to be the precise duration of the employment of these labourers, or when their hiring was to end, or what was the precise nature of the contract the respondent had entered into with the owner of the *Sieben Jarl* for her discharge. But however that may be, your Lordships are not concerned on this appeal with the question of the quantum of the damages.

An objection has been made, however, to this finding on the strangest ground, namely, this, that owing to an alleged misdirection by the Chief Baron, three members of the Stevedores'

(1) 2 E. & B. 216.

Association, namely, William Long, Newman, and Donohoe, have been found guilty equally with the three appellants of the tort mentioned in the third question. Yet these three additional tortfeasors are apparently satisfied with their position. They are not parties to this appeal.

The appellants, however, though they have nothing to complain of in the way of misdirection against themselves, ask to have the verdict set aside, because they have, through this alleged misdirection, got companions in misfortune to whom they object. The alleged misdirection consists in this.

The jury came into Court with an answer to the third question implicating the three appellants alone. The Chief Baron pointed out to the jury that they had only answered the question as to three of the six defendants charged, and sent them back to answer the question as to the three remaining defendants.

That was a perfectly proper course. If the jury thought the three omitted defendants were not guilty of the tort charged, it was the right of these latter to have a finding in their favour to that effect.

One of the jurors then asked the Chief Baron whether they had any evidence against the three defendants in reference to whom they had been silent, and he replied that if there was an agreement among six and three of them did acts in pursuance of the agreement, the acts were the acts of the six.

It is quite obvious, however, that the Chief Baron in these observations was not referring to all agreements, or to any act done in pursuance of them, or to any agreement other than the agreement mentioned in question 3, about which the jury were in a difficulty, or to any acts done in pursuance of that agreement other than the acts mentioned in the question. It is, I think, quite impossible to suppose that the jury understood his observation in any other sense, and so confined, the so-called misdirection was, in my view, perfectly right in point of law. But even if it were not so, I do not think the appellants would have any right whatever to object to the verdict for this misdirection, as it does not affect them.

The jury have found that the acts mentioned in questions 1, 2, and 3 caused actual money loss to the plaintiff.

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The next ground relied on by the appellants in support of the appeal was that set forth in the fifth paragraph of their defence, to the effect that at the time the things complained of were done by them a trade dispute was pending between the plaintiff, the dock labourers of the port of Dublin, and the Transport and General Workers' Union acting on their behalf, relative to the wages and rate of remuneration to be paid by the plaintiff to dock labourers for their work in discharging cargoes, and that in refusing to allow any of such labourers to work for the plaintiff, and in withdrawing them from his employment, they were acting as they lawfully might in contemplation and furtherance of such trade dispute within the meaning of the Trade Disputes Act, 1906 (6 Edw. 7, c. 47).

The jury have found on the issues raised on this plea that there was no dispute between the plaintiff and the dock labourers. And they have also found that the dispute was a dispute between the plaintiff and the Stevedores' Association, into which the stevedores brought Larkin, Hopkins, and Redmond to assist. And further, that the labourers did not insist that the plaintiff should become a member of the Stevedores' Association.

There was, in my opinion, ample evidence to sustain all these findings. The evidence of the two defendants, William Long and Newman, would be quite sufficient in itself for that purpose. It was plain upon the evidence that the only dispute which existed was a dispute between the members of the Stevedores' Association and the plaintiff. The Association sought to force the plaintiff to enter its ranks in order that he might thereby be compelled to adopt the scale of remuneration for any dock labourers he might employ which this Association had adopted. Larkin, Hopkins, and Redmond, at the request of the Association, came to their aid, and sought to bring pressure to bear upon the plaintiff to force him to enter it, by refusing to permit the dock labourers who were members of the Transport Union to work for him.

But these officers of the union of employees by so aiding the association of employers in its contest with the plaintiff, another employer, did not change the character of the original dispute.

It was from the first a dispute between an individual stevedore and an association of stevedores.

The Trade Disputes Act of 1906 has no application to such disputes. It only deals with disputes between employers and workmen and workmen and workmen. This dispute was neither of these. This defence, therefore, wholly fails.

Serjeant Sullivan, on behalf of the appellants, insisted that the fact that the members of the Transport Union thought it for their own interest to pass a rule that they should not work for a stevedore who was not a member of the Stevedores' Union was quite legitimate, that they were not bound to work for him or for any other person for whom they did not choose to work, and were, in the legitimate promotion of their own interest, entitled, within the decision of *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1), to observe that rule, though it might incidentally cause injury to those who desired to employ these workmen, but for whom they themselves did not desire to work. It is undoubtedly true that the members of a trade union need not work for those for whom they do not desire to work. That is the right to personal freedom of action referred to in the following well-known passages from the judgment of Lord Bramwell in *Reg.* v. *Druitt* (2) and from the essay of Sir W. Erle on Trade Unions (p. 12). They have been many times approved of in your Lordships' House. They respectively run thus: "The liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry was as much a subject of the law's protection as was that of his body." And, "Every person has a right under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labour or his own capital, according to his own will. It follows that every person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others."

But it is equally true that the members of trade unions are bound to respect the right of other workmen to work for whom they please, on what terms and at what times they please, so

(1) [1892] A. C. 25. (2) (1867) 10 Cox, C. C. 592, at p. 600.

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long as they do nothing illegal, and are also bound to respect the right of an employer to undertake any work he pleases to undertake, and to employ what workmen he chooses, on whatever terms they both agree to, unless there is something unlawful in his action. If, therefore, any two or more members of a trade union, whatever its rules may be, wilfully and knowingly combine to injure an employer by inducing his workmen to break their contracts with him, or not to enter into contracts with him, resulting in damage to him, that is an entirely different matter. That is an invasion of the liberty of action of others, and has no analogy to the action of the defendant in the *Mogul Case* (1); for there, as Lord Halsbury pointed out in *Quinn* v. *Leathem* (2), no legal right had been interfered with, no coercion of mind or will had been effected, all were left free to trade on what terms they willed, and nothing was done except in rival trading which could be supposed to interfere with the appellant's interest.

The fact that members of a trade union are merely acting in obedience to a rule of their union believed by them to be for their benefit is no defence to an action for the breach of any contracts they have entered into,—*Read* v. *Friendly Society of Operative Stonemasons* (3)—and still less is it a defence to the wilful and malicious infringement in combination of that legal right of personal freedom of action which they claim for themselves, but which others are entitled to quite as fully and as absolutely as they are.

I am clearly of opinion that the decision appealed from was right and should be upheld, and the appeal should be dismissed with costs.

My Lords, I am directed by the Lord Chancellor to say that he concurs in the judgment I have just read.

LORD PARKER OF WADDINGTON. (4) My Lords, notwithstanding the arguments addressed to your Lordships by counsel for the appellants, this case seems to me to be reasonably plain. The jury have found: (1.) That there existed an agreement or combination between the defendants to force

(1) [1892] A. C. 25.
(2) [1901] A. C. 495.
(3) [1902] 2 K. B. 88, 732.
(4) Read by Lord Sumner.

the plaintiff to join the Stevedores' Association; (2.) that, pursuant to this combination or agreement, the defendants induced or procured dock labourers who had engaged to work for the plaintiff and who were then actually working for the plaintiff to break their contracts and leave the plaintiff's employment; and (3.) that the said acts caused actual money loss to the plaintiff. These findings bring the case within the principle of *Lumley* v. *Gye* (1), approved by this House in *Quinn* v. *Leathem*. (2)

The appellants endeavour to displace their prima facie liability upon the principle of *Lumley* v. *Gye* (1) in the following way: First, they contend that there was no evidence before the jury upon which they could reasonably find pecuniary loss to the plaintiff; secondly, they say that all that they did was done in contemplation or furtherance of a trade dispute within the Trade Disputes Act, 1906, and rely on that Act as a defence to any civil proceedings.

With regard to the first point, the appellants' contention may be stated as follows: First, they say the dock labourers were engaged by the half-day only, and, though they left work at 7.15, they would have fulfilled their contracts had they continued to work for the plaintiff until 11 o'clock; secondly, they say that the plaintiff's contract to unload the vessel in question was an entire contract under which the plaintiff would have been entitled to no remuneration had he failed to complete the job; thirdly, they say that the plaintiff's failure to complete the job was not due to the dock labourers breaking their contracts, but to the fact that neither they nor any dock labourers in Dublin, all of whom were under the appellants' direction and control, would, under the circumstances, have consented to work for him.

In my opinion, this argument cannot be accepted. It is by no means clear on the evidence that the dock labourers who broke their contracts were engaged by the half-day only. The plaintiff says he engaged them to discharge the vessel, adding that he could not employ them for less than half a day. He does not say that he could not, or did not, employ them for more than half a day. Similarly, it is by no means clear on the evidence

(1) 2 E. & B. 216. (2) [1901] A. C. 495.

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that the plaintiff's contract with the shipowner was an entire contract under which he would be entitled to no payment unless he completed the job. There is certainly no direct evidence to this effect, and there is evidence that the usual method of payment for the discharge of a ship is so much per "standard" of 143 cubic feet, and not a lump sum for the whole job. Even, however, if the job was an entire one, payment being conditional on completion, and even if the non-completion was not consequent on the breaches of contract alleged, I do not think it clear that the plaintiff could have suffered no damage by reason of the breach. In my opinion the jury might legitimately take into account the necessary dislocation of the plaintiff's business and the injury to his reputation among shipowners. Under these circumstances it cannot be contended that there was no evidence of damage to go to the jury, and the amount awarded by them is not in question on this appeal.

My Lords, I am also of opinion that the second contention of the appellants, to the effect that all that they did was in furtherance or contemplation of a trade dispute within the meaning of the Act of 1906, is equally untenable. A "trade dispute" within the meaning of the Act must be a dispute between employers and workmen or between workmen and workmen. The jury have found that there was not at the time of the acts complained of any dispute between the plaintiff and the dock labourers, but that the dispute then existing was between the plaintiff and the Stevedores' Association, a union of employers, and that this union brought in the officials of the dock labourers' union to assist. There was, in my opinion, ample evidence to justify these findings. Unless, therefore, as a matter of law, there must be a trade dispute within the meaning of the Act whenever the officials of a workmen's union are called in to assist one party to a dispute between employers, or, indeed, between any other persons, the appellants' contention must necessarily fail. The Act of 1906 confers immunity from civil liability in respect of certain acts, if done in furtherance or contemplation of a trade dispute, and to this extent abrogates or curtails the rights of His Majesty's subjects at common law. An Act of this sort ought, according to principles which have hitherto prevailed in

construing Acts of the Legislature, to be construed with reasonable strictness and not to be given a meaning wider than the words used will justify. There is nothing, in my opinion, in the Act which would justify the Court in holding that a dispute, not in its origin a trade dispute, will become a trade dispute merely because the officials of a workmen's union chose to assist one side or the other. I do not say that no dispute, not originally a trade dispute, can become a trade dispute by the interference of a workmen's union. I can imagine circumstances where it might, but to hold that every dispute in which the officials of a union chose to interfere must be a trade dispute would, in my opinion, unduly extend the immunity from liability conferred by the Act, and, therefore, unduly curtail the common law rights of other persons.

In my opinion the appeal fails.

Lord Sumner. My Lords, the appellants' grounds of objection to the verdict and judgment against them are (1.) misdirection; (2.) that the verdict was against the weight and, indeed, directly contrary to the evidence; (3.) that the plaintiff's evidence showed no cause of action; (4.) alternatively, that, if it did, the defendants were protected from liability by reason of the Trade Disputes Act, 1906, s. 3.

Of the directions actually given to the jury by Palles C.B. your Lordships have no admissible record beyond what may be collected from the learned judge's report. It shows nothing exceptionable in this regard. Counsel for the defendants submitted careful requisitions and objections after verdict as well as before, but there is no note of any objection or submission directed to the terms of the summing-up. In any case misdirection would not avail unless it appeared to be such as might reasonably be supposed to have affected the verdict. I can find no materials on which the appellants can found an argument on the first head.

Complaint is also made that the plaintiff was allowed to amend his statement of claim at a very late stage, and that the questions for the jury were directed rather to the amended case than to that originally pleaded. The question of amending the

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pleadings was in the learned judge's discretion, and, except as to costs, immaterial, unless it was such as to bias or mislead the jury or to place the defendants at some disadvantage in respect of the evidence called. The latter is not suggested; the former would be prevented or corrected by a proper summing-up, and there is nothing to show that the summing-up was defective in this regard.

Heads 2 and 3 may be dealt with together. Whatever else was alleged and found, the plaintiff alleged and the jury found that the defendant Hopkins, acting with the concurrence of his co-defendants Larkin and Redmond (for such is clearly the sense of the finding), induced the plaintiff's employees to break their contracts of service with him during their first spell of work in discharging the *Sieben Jarl*, and thereby caused him pecuniary damage. It is not, and cannot be, denied that this gives a good cause of action, though the Trade Disputes Act may be an answer to it. If there was evidence to support it, so far the verdict must stand.

Damage is of the essence of this cause of action, and it is said there is no evidence that any was occasioned. There was no appeal from the quantum of damages given by the jury. Large as they are, they must be taken to be correct, if any damage was proved. Even if the terms of the plaintiff's contract with the shipowner were such that he was entitled to no remuneration unless and until he had completely discharged the ship, I do not think it can be said that the admitted act of calling off his labourers in breach of their contracts did not evidence such pecuniary injury to him in his business as to found the action. Presumably he came under liability to the shipowner for his failure to complete the discharge. In any case he was to be remunerated on the basis of a money rate for a quantity standard of work done, and he was not cross-examined or contradicted as to this. Presumably he would be entitled to payment pro rata, which would be sufficient to provide a profit, though only a small one. If so, that profit was lost. It is said that the ordinary stevedore's contract is entire, and that he would be entitled to nothing till the ship was discharged. Hence he lost no profit by the breach of the workmen's con-

tracts, for the performance of those particular contracts alone would have brought him none, and he lost nothing out of pocket, for he paid them nothing. However probable it may be that his contract was entire, this was not formally admitted, and cannot be assumed merely because, as is stated, the contention of the defendants' counsel to that effect has passed sub silentio. The jury's findings, Nos. 1, 2, and 3, amount to an express finding that what the defendant Hopkins did was done in pursuance of an agreement between himself and his co-defendants to force the plaintiff to join the Stevedores' Association, which is sufficient to make all the appellants prima facie liable, if there was evidence to support it. I do not understand the objection made to the course taken by the learned judge when the jury first returned their answers to the issue paper. He drew attention to their omission to deal with question 3 as affecting three of the defendants. I think he was quite right. The jury had not meant to acquit them under this head; they had evidently failed to observe the full scope of the question.

My Lords, I cannot doubt that there was evidence upon which the jury could find against the appellants, as they did in this regard. Under the circumstances it is obvious that part of the agreement to form a Stevedores' Association was to force any stevedore to join who might wish to stand out. The fact, if it be one, that the plaintiff was at first supposed to be willing to join or to have joined already, is immaterial. There was a continuing agreement, and, when he declined to join, it clearly was part of the agreed plan to compel him to do so. To take any other view of the matter would do complete injustice to the business acumen and tactical skill of the appellants under the circumstances. I think, therefore, that it becomes unnecessary to consider whether the plaintiff did not equally succeed in establishing his cause of action upon the principle of *Quinn* v. *Leathem* (1), or to discuss the form in which this matter was left to the jury, but I do not wish to be supposed to dissent from the decisions upon this head which were given in the Courts below.

(1) [1901] A. C. 495.

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The remaining and I think the only real question is whether the Trade Disputes Act, 1906, affords a defence. Here the burden of proof was on the defendants to show that what Hopkins did, with the concurrence of his co-appellants, was done in furtherance of a trade dispute as defined by the Act. The jury found the contrary. They were the judges of the credibility of the witnesses, who swore that between the plaintiff and his employees there was no dispute at all. This they accepted.

The appellants' case is that the admitted facts constituted a statutory trade dispute nevertheless. Those facts are that the officials of the Transport Workers' Union, the present appellants, acting in purported furtherance of the interests of the members of the union in their trade, and confident (I daresay rightly confident) that the members of the union would act upon their orders, even though neither previously consulted nor subsequently asked to ratify and adopt their acts, first of all promoted the formation of a trade union of employers, among whose objects was the compulsory inclusion in its membership of all the Dublin stevedores; secondly, promised that trade union the assistance of the Transport Workers' Union; and lastly, in performance of that promise procured the plaintiff's employees to break their contracts of service.

My Lords, I think there is an initial difficulty in the appellants' way of which they have been scarcely conscious. Even if the actual dealings with the labourers were done in furtherance of some trade dispute within the meaning of the statute, arising there and then when the men were called off the *Sieben Jarl*, it is quite indisputable that they were also done in furtherance of another dispute, namely, that arising between the plaintiff and the Stevedores' Association, upon the question whether or not he should become a member of it. This latter dispute was not a trade dispute within the Trade Disputes Act, 1906, s. 5, sub-s. 3. Is the only ground for calling the acts in question actionable that they induced certain labourers to break their contract, or is there an additional ground, that they were done to further a conspiracy to coerce one employer at the instance of other employers, and in furtherance of a dispute which was not a trade dispute? Even if the acts in question are excusable

because done in furtherance of the trade dispute which the appellants allege to have existed and so far are protected by s. 3 of that Act, still, in so far as they were done in furtherance of a dispute to which that Act does not apply, they may stand outside the protection of that Act, and so, being actionable at common law, be indefensible. As this point was not argued I reserve the expression of any opinion upon it.

It seems to me, however, impossible upon the facts proved and admitted, and in face of the jury's findings, to say that there was at any time any dispute between employers and workmen at all. The plaintiff complied, and intended to continue to comply, with all the requirements of the Transport Workers' Union, both as to wages and hours and conditions of employment. With him his employees were quite content; they had no quarrel with him and wished for none. They did as the Transport Workers' Union delegate told them, but the dispute which he was engaged in furthering had nothing to do with their "employment or non-employment or the terms of the employment or the conditions of labour." It was solely a dispute between one employer, the plaintiff, and sundry others, the other stevedores, and the present appellants, which in its turn had as its object the prosecution of an ulterior dispute between one group of employers, the stevedores, and another, namely, the shipowners of Dublin severally or collectively.

I think that the observations of Lord Macnaghten on the very similar position in *Quinn* v. *Leathem* (1) are much in point: "So far as I can see, there was no trade dispute at all. Leathem had no difference with his men. They had no quarrel with him. For his part he was quite willing that all his men should join the union. . . . . There was certainly no trade dispute in the case of Munce. But the defendants conspired to do harm to Munce, in order to compel him to do harm to Leathem and so enable them to wreak their vengeance on Leathem's servants, who were not members of the union." It was contended that as the appellant Larkin promoted the Stevedores' Association in purported furtherance of the interests of the Transport Workers' Union, any dispute which arose between the association of

(1) [1901] A. C. 495, at p. 511.

H. L. (I.) 1915 LARKIN v. LONG. Lord Sumner.

employers and another employer comes to be a statutory trade dispute by reason of its supposed effect on the interests of the employees. The contention is unfounded. There is no more a statutory trade dispute here than there was between Quinn's union and Munce in *Quinn* v. *Leathem*. (1) If B. and C. quarrel about the interests of A., that is not A.'s quarrel; still less is it A.'s quarrel when neither A. nor B. has any wish to dispute at all, and the whole object of the dispute which C. forces upon B. is to bring about the coercion of D., a state of things from which it is supposed that benefit may ultimately reach the passive and placable A.

One point remains, the form of the judgment for damages. The now appellants say that, even though they were rightly adjudged to be liable, they can require the judgment to be set aside if they can show that their co-defendants, who were also adjudged to be liable but who do not appeal, had a good defence to the action. They are entitled, it is said, though liable by themselves, to refuse to stand for ever on record as liable in such company; in other words, a judgment debtor, who has no grounds for appealing himself, may be relieved from the judgment because a co-defendant might have appealed successfully if he had cared to do so. No authority is cited for this proposition, and I am not minded to make one, but having failed to apprehend on what legal basis the argument is supposed to rest, I must confess my inability to answer it further.

I think that the appeal should be dismissed.

LORD PARMOOR. My Lords, the respondent has for many years carried on the business of a stevedore in the port of Dublin. The appellant Larkin is secretary, and the other appellants are members of the Irish Transport Workers' Union, founded in Dublin in 1904. The appeal is from an order of the Court of Appeal in Ireland refusing to set aside an order of the Divisional Court of the King's Bench Division, which confirmed a judgment entered for the respondent on December 6, 1912, in an action tried by the Lord Chief Baron.

There was no stevedores' union in Dublin prior to 1912. In 1912

(1) [1901] A. C. 495.

Larkin issued a circular to all the stevedores in Dublin—about twelve in number—asking them to meet him at Liberty Hall. The meeting took place in June and the respondent was present. At this meeting Larkin explained a scheme for alteration in the conditions of labour in the discharge of vessels in the port of Dublin, stating that his object was not directly to increase the wages of each individual, but that more workmen should be employed. The scheme, if adopted, would increase the cost incurred by the stevedores in the discharge of vessels, and at their instance the consideration was adjourned. Shortly after this conference, a meeting of the stevedores took place in Shaw Street, and the new proposal for the employment of labour in the discharge of vessels in the port of Dublin, which had been printed, was considered. The respondent's evidence is that he found both the rate of wages and the terms of employment were those in operation in his own business, and that as the proposal did not affect him he had no further interest in it. According to his own evidence the respondent was not present at any subsequent meeting.

On June 20 the stevedores assembled at Liberty Hall to further discuss the suggested proposal. The stevedores were willing to agree to the alteration in the conditions of labour if they could get additional payment from shipowners to cover the additional cost. Larkin then proposed that the stevedores should form an association to fix a scale of payment from the shipowners, and said that he would give his help in seeing that no union man would work for any stevedore who was not a member of the Stevedores' Association. It is clear that the Stevedores' Association was formed some time in July, and that the main object of the Association was to obtain additional payment from the shipowners to meet the additional cost of labour which would be incurred under the scheme put forward by Larkin. On July 24 the respondent was shown a proposed scale of charges between the Association of Stevedores and the shipowners, but he refused to join the Association, on the ground that the high rates would exclude stevedores, and that shipowners would not employ them. The respondent was told at this interview that Larkin would not allow any man to work for a stevedore who was not a member

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of the Association. On July 27 there was a further meeting between the respondent and representatives of the stevedores, when the respondent was told that he would get no men to work for him, as Larkin had promised to assist the Association in every way to get their prices, and that, if he did not join, Larkin would withdraw the men from him. On the same evening the respondent was told that Larkin wanted him, and he went to Liberty Hall, but he did not see Larkin.

On August 2, 1912, the respondent discharged a ship without interference, and he had no difficulty in obtaining men to work for him. On August 7 a ship, the *Sieben Jarl*, arrived at the port of Dublin. The appellant Redmond called on the respondent, asking him to see Larkin. At this interview Larkin told the respondent that unless he joined the Stevedores' Association and charged the same rates he would withdraw the men. The respondent made a contract with the shipping agent to discharge the *Sieben Jarl*, and employed for this purpose a gang of men. The men began to work in the ordinary way and had worked about an hour when Redmond and Hopkins, at 7.15, called the men off during the first half-day's employment. Hopkins told the respondent that he would be further stopped until he joined the Stevedores' Association. Thirty-three men were working at the discharge of the *Sieben Jarl* when they were called off. It is clear that at this time these men were under contract for employment with the respondent, although the period of such employment is not clearly defined. On August 22 the *Shuna* was in port and the respondent obtained the contract to discharge her. The men were halfway down to the ship when Hopkins held up his hand to the men and stopped them and told them they were not to work for the respondent. From August 22 until September 23 the respondent did not try to discharge a ship. On September 23 he tried to discharge the *Thelma*, and he engaged for this purpose forty men. They started to discharge at 12 o'clock, but Hopkins took the men off and they left. This was the last effort the respondent made, and since then he has been prevented from discharging any ship.

On August 19 the respondent issued a writ of summons, and the statement of claim was delivered on October 21. Upon

motion made by Serjeant Moriarty, on December 5, to the Lord Chief Baron, the respondent was granted liberty to amend his statement of claim by adding two additional paragraphs. Serjeant Sullivan argued that this amendment should not have been allowed, but it was a matter within the discretion of the Lord Chief Baron. There is nothing to show that this amendment placed the appellants under any disadvantage, or that there was any confusion in the summing up of the case to the jury by the Lord Chief Baron. It is unnecessary to refer further to this point.

At the close of the respondent's case it was submitted on behalf of the appellants, and also on behalf of the other defendants—Long, Newman, and Donohoe—that there was no evidence proper to be submitted to the jury to sustain the plaintiff's claim, and that there was a trade dispute existing at the port of Dublin on the occasions complained of by the respondent. These objections were overruled, and the Lord Chief Baron left certain questions to the jury. I agree in the opinion expressed in the words of the Lord Chief Baron, that there was ample evidence of acts of each of the defendants which would have been actionable prior to the passing of the Trade Disputes Act, 1906; that consequently it lay on the defendants to show that such acts were done by them in contemplation or furtherance of a trade dispute as defined by that Act; and that it was competent for the jury to hold that the only dispute was a refusal to allow the dock labourers to work for the respondent unless he became a member of the Stevedores' Association.

The findings of the jury are set out in the certificate of the registrar. The jury found that the appellants with the other defendants, who are not appealing, did agree to force the respondent to join the Stevedores' Association, and that in pursuance of the said agreement they did induce or procure dock labourers who were engaged to work for plaintiff, and were then actually working for plaintiff, to break their contracts and leave plaintiff's employment on the *Sieben Jarl* on August 8, and that the said acts did cause actual money loss to the respondent. There was a further finding that the appellants and the other defendants used threats to force the respondent to join the Stevedores'

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Association. In reference to this finding, it was contended that the Lord Chief Baron gave a wrong direction when asked by one of the jury, "Have we any evidence as regards the defendants other than the appellants?" The answer of the Lord Chief Baron appears to have been perfectly explicit, and without doubt correct, "If there was an agreement amongst six, and three of them do acts in pursuance of the agreement, the acts are the acts of the six." Seeing, however, that the defendants other than the appellants are not appealing, it is impossible to say that the present appellants can in any way have been prejudiced by the direction of the Lord Chief Baron. The jury assessed the respondent's damages up to the date at which the writ was issued at 200*l.*

The facts as found by the jury are amply sufficient to establish that the appellants did commit wrongful acts in derogation of the rights of the respondent, and to his pecuniary loss, and that unless the Trade Disputes Act, 1906, applies, they are liable in the action. For this proposition the case of *Quinn* v. *Leathem* (1), which explicitly approves *Lumley* v. *Gye* (2), is a sufficient authority. To quote the words of Lord Macnaghten: "It is a violation of legal rights to interfere with contractual relations recognized by law if there be no sufficient justification for the interference." I understood the main argument of Serjeant Sullivan, under this part of his address, to be directed to establish that there was under the circumstances of the present case a sufficient justification for interference. There was some confusion in his reference to the *Mogul Case* (3) and cases of a similar character. These cases have no application when there is a wrongful act which requires justification. They are decided on the different ground, that there was no wrongful act and no infringement of the rights of other persons. Assuming then that there has been a wrongful act, what is the justification?

There was no duty of any kind on the appellants to commit the acts charged against them, and in this absence of duty of some kind it is difficult to see how justification is possible. The

(1) [1901] A. C. 495. (2) 2 E. & B. 216.
(3) [1892] A. C. 25.

highest point to which the argument can be carried in favour of the appellants is that the appellants acted without sinister motive in the supposed interests of the men and without ill-will to the respondent, but these are considerations which do not alter the wrongful nature of the acts charged against the appellants, and cannot be successfully urged as an excuse or justification: *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (1)

The second point taken on behalf of the appellants is that there was no evidence that the acts charged against the appellants resulted in any damage to the respondent. It is necessary to put the argument on the ground of no evidence of damage, since if there is any evidence of damage the amount found by the jury stands, and it is not claimed that it can be questioned. In a case of this character the jury are not limited to an assessment of a specific sum for damages founded on the actual loss proved, but may take into consideration all the circumstances of the wrong. The actual direction of the Lord Chief Baron to the jury on the amount of damages was not before your Lordships, but if it is desired to question this direction the onus is upon the appellants. Serjeant Sullivan based his argument that there was no evidence of damage on an assumption which was not established at the hearing of the action. The assumption was that the contract made by the respondent to unload the *Sieben Jarl* was one entire contract, and that the respondent was not entitled to any payment under the contract until the whole cargo had been discharged, and that, apart from the workmen being induced to break their employment by the appellants, the respondent could not have performed his contract, if the workmen had refused to return after the period for which they were under contract with the respondent, whether this period was for a half-day, or for the first full day. I can find no adequate evidence to support this assumption, or that the respondent might not have recovered in respect of work actually done under the contract, but making the assumption in favour of the appellants there is still ample evidence of some damage, and this is sufficient to support the verdict. The real complaint is that the damages are far in excess of any figure

(1) [1905] A. C. 239.

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of any possible loss in connection with the discharge of the cargo of the *Sieben Jarl*, but the jury were not limited to this figure, and the appellants cannot claim to reopen the question of amount.

The remaining point argued by Serjeant Sullivan for the appellants is that the appellants, even if liable on general principles of law, are protected from liability by the Trade Disputes Act, 1906. Sect. 3 of this Act provides that an act done by a person in furtherance or contemplation of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills. The governing words of this section are "in furtherance or contemplation of a trade dispute." The question is whether the acts of the appellants came within the protection of these words. Before referring to this contention I desire to draw attention to the word "only," and to express my concurrence with the views of Lord Sumner as to the difficulty which these words place in the way of the argument for the appellants. This point was not, however, directly argued, and I agree with Lord Sumner that it is desirable in the absence of argument to reserve any expression of opinion upon it.

In order to determine whether acts have been done in furtherance or contemplation of a trade dispute, it is necessary to determine what is a trade dispute within the Act of 1906. There is a definition of the expression in s. 5, sub-s. 3. "The expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment and non-employment or the terms of employment or with the conditions of labour." The definition is not limited to workmen in the employment of the employer with whom a trade dispute arises, but no question arises under this part of the sub-section in the present case. Serjeant Sullivan argued that there was a trade dispute within the meaning of the Act of 1906 at the time when the men working for the respondent were called away from their work in the discharge

of the *Sieben Jarl*. The burden of proving that there was such a dispute, and that, consequently, the acts of the appellants come within the protection of the Act of 1906, is upon the appellants.

In answer to questions left to them, the jury found, first, that at the time of the acts complained of there was no dispute between the plaintiff and the dock labourers. It cannot be said that there was not sufficient evidence to support this finding. At the time of the acts complained of none of the workmen employed by the respondent were complaining either of the wages received or of the conditions of labour. It is admitted that the respondent had, in the course of his previous employment of workmen, given the wages and terms demanded by the workmen's union. The jury found in the second place that the dispute was one between the respondent and the Stevedores' Association, into which the stevedores brought Larkin, Hopkins, and Redmond to assist. There is ample evidence to support this finding. The evidence is practically all in one direction. Unless it can be said that the stevedores are "workmen," these two findings are conclusive against the appellants as to the conditions which existed when the acts complained of took place. The stevedores were clearly not workmen but in the position of employers. There was a further finding of the jury, that it was not the workmen who insisted that the respondent should become a member of the Stevedores' Association, but this finding is less important.

In order to meet the case made against him Serjeant Sullivan urged that the appellants, by taking sides in a dispute between the respondent and the Stevedores' Association and calling out the workmen employed by the respondent, altered the character of the dispute, so that a dispute which up to the time of the acts complained of was not a trade dispute within the Act of 1906 became such a dispute, and that the appellants were accordingly protected from all liability. I am unable to accept this argument. No doubt a dispute may change its character so as to become a trade dispute in its later stages although it was not a trade dispute in its origin. But in the present instance there is nothing more than a choice by the appellants to assist

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one side in the dispute between the respondent and the Stevedores' Association, a dispute which was not in its origin, and which never became in its later stages, a dispute within the Act of 1906. To hold that the acts in this case bring the dispute within the Act of 1906 would be in effect to disregard the definition of the Act of 1906, and to bring within the protection of the Act every dispute of whatever character in which workmen and their representatives determined to take part with one side or the other. The construction of the expression "trade dispute" in the Act of 1906 has been considered in this House, and it is unnecessary to do more than refer to the case of *Conway* v. *Wade*. (1)

My Lords, in my opinion the appeal should be dismissed with costs.

LORD DUNEDIN. My Lords, I concur.

Order of the Court of Appeal in Ireland affirmed and appeal dismissed with costs.

Lords' Journals, April 29, 1915.

Solicitor for appellants: *Herbert Z. Deane, for William Smyth & Son, Dublin.*

Solicitors for respondent: *Barlow, Barlow & Lyde, for M. Good, Dublin.*

(1) [1909] A. C. 506.

[HOUSE OF LORDS.]

DUNLOP PNEUMATIC TYRE COMPANY, LIMITED . . . . . } APPELLANTS;

AND

SELFRIDGE AND COMPANY, LIMITED . RESPONDENTS.

H. L. (E.)* 1915 April 26.

Contract—Construction—Principal and Agent—Undisclosed Principal—Want of Consideration moving from Principal.

In 1911 D. & Co., who were motor accessory factors, agreed with the plaintiffs, who were motor tyre manufacturers, in consideration of the plaintiffs' allowing them certain discounts off their list prices, to buy a given quantity of the plaintiffs' goods within a specified time; also not to sell or offer the plaintiffs' goods to any person at less than the plaintiffs' list prices, except that D. & Co. were to be at liberty to allow to genuine trade customers a limited discount off such list prices, and in case of any such sale they agreed, as the plaintiffs' agents, to obtain from the trader a similar undertaking that he would observe the plaintiffs' list prices and to forward such undertaking to the plaintiffs. The plaintiffs exacted similar agreements from all their trade purchasers, and this was known to the defendants, who were large storekeepers and sold tyres by retail to the public.

In January, 1912, the defendants ordered tyres of the plaintiffs' make from D. & Co., and by an agreement purporting to be made between the defendants and D. & Co., in consideration of D. & Co.'s allowing them certain discounts off the plaintiffs' list prices, they agreed (inter alia) not to sell or offer any motor tyres of the plaintiffs' make to any private customer at less than the list prices. The plaintiffs sued the defendants for breach of this contract:—

Held, assuming that the plaintiffs were undisclosed principals, that no consideration moved from them to the defendants, and that the contract was unenforceable by them.

Per Lord Parmoor: The claim of the plaintiffs to be treated as undisclosed principals was inconsistent with the terms of the contract.

Decision of the Court of Appeal [1914] W. N. 59 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Phillimore J.

The appellants were manufacturers of motor tyres, covers, and tubes, and substantially the whole of their business in these articles was done through the trade. The system of business

* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

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adopted by the appellants was as follows: They allowed trade purchasers from them certain trade discounts off the list prices of the goods and in consideration thereof they insisted that such trade purchasers should enter into contracts with them whereby the said trade purchasers agreed not to sell to private customers at less than the appellants' current list prices or to trade customers at less than the current list prices after deducting certain discounts, and further agreed, as agents of the appellants, to obtain from sub-purchasers, being trade customers, similar undertakings to observe the appellants' list prices.

The respondents were retailers and storekeepers in Oxford Street, and part of their business consisted in retailing to the public motor tyres, covers, and tubes of various manufacturers (including the appellants). The respondents were aware of the appellants' system of conducting business.

Messrs. A. J. Dew & Co. carried on business in Endell Street, London, as factors and dealers in motor tyres and tubes and other motor accessories.

By an agreement in writing dated October 12, 1911, between Messrs. A. J. Dew & Co. and the appellants, Messrs. A. J. Dew & Co., in consideration of the appellants' allowing them a trade discount of 10 per cent. for prompt monthly payments off their list prices for motor tyres, covers, tubes, and repairs current from time to time, and 25 per cent. off their list prices current from time to time for motor tyre sundries, agreed to purchase Dunlop motor tyres, covers, tubes, and sundries to the net value of 2000*l.* before the expiration of September, 1912, and if the net value of Messrs. A. J. Dew & Co.'s purchases during the above named period amounted to 2000*l.* they were to be allowed a rebate of 9 per cent. on the net amount of cash paid by them. And Messrs. A. J. Dew & Co. further agreed as follows:—

Not to sell or offer any Dunlop motor tyres, covers, tubes, or sundries to any private customer or to any co-operative society at prices below the appellants' list prices current at the time of sale nor give to any such customer or society any cash or other discounts or advantage reducing the same.

Not to sell or offer any Dunlop motor tyres, covers, tubes, or sundries to any other person, firm, or company at prices less

than the said list prices, but they were to be at liberty to allow to persons legitimately engaged in the motor trade (other than co-operative societies and persons included in the next succeeding clause) a discount not exceeding 10 per cent. off such list prices plus the appellants' authorized scale of rebates on the net value of purchases of such goods, and in the case of any sale of such tyres, covers, or tubes by A. J. Dew & Co. to any such trader they agreed, as agents for the appellants in that behalf, to obtain from such trader a written undertaking that he would similarly observe the appellants' list prices, terms, and conditions of sale current at the time of sale in any resales by him, and they further agreed to forward all such undertakings to the appellants on demand and not to allow such trade discounts to any such person without previously obtaining such written undertaking.

Not to supply any Dunlop goods to any person whose supplies the appellants requested them to suspend.

To pay the sum of 5*l.* for each tyre, cover, or tube sold or offered in breach of the conditions of the contract as liquidated damages and not as penalty and without prejudice to any other rights of the appellants under the contract.

On December 22, 1911, the respondents accepted an order from Captain Eustace Jameson for a Dunlop grooved cover at the price of 5*l.* 10*s.*, and on January 1, 1912, they accepted an order from a Mr. Strauss for a Dunlop steel studded cover at the price of 4*l.* 10*s.* These prices were below the prices mentioned in the appellants' current price list. On January 2 the respondents ordered these covers from Messrs. A. J. Dew & Co., who obtained them from the appellants and delivered them to the respondents on the same day. Together with the covers Messrs. A. J. Dew & Co. sent to the respondents a letter enclosing a price maintenance agreement which they requested the respondents to sign. This agreement provided (so far as material) as follows:—

"PRICE MAINTENANCE AGREEMENT

To be entered into by Trade Purchasers of Dunlop Motor Tyres.

"Messrs. Selfridge & Co. to Messrs. A. J. Dew & Co.

"2nd Jan. 1912.

"Dear Sir,

"In consideration of your allowing us a trade discount

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of 10 per cent. for prompt monthly payments off the list prices for motor tyres, covers, tubes and repairs contained in the Dunlop Pneumatic Tyre Co.'s list current from time to time . . . .

"(2.) We will not sell or offer any Dunlop motor tyres, covers or tubes to any private customers or to any co-operative society at prices below those mentioned in the said price list current at the time of sale, nor give to any such customer or society any cash or other discounts or advantages reducing the same. We will not sell or offer any Dunlop motor tyres, covers or tubes to any other person, firm or company at prices less than those mentioned in the said price list.

"(5.) We agree to pay to the Dunlop Pneumatic Tyre Co., Ltd., the sum of 5*l.* for each and every tyre, cover or tube sold or offered in breach of this agreement, as and by way of liquidated damages and not as a penalty, but without prejudice to any other rights or remedies you or the Dunlop Pneumatic Tyre Co., Ltd., may have hereunder."

The agreement was signed about a week later by the respondents' manager and returned to Messrs. A. J. Dew & Co.

In the meantime, namely, on January 3, the respondents delivered to Captain Jameson the cover he had ordered at the price agreed upon.

The respondents subsequently informed Mr. Strauss that they were unable to deliver the cover ordered by him except at the list price of 4*l.* 17*s.* 3*d.*, and this cover was debited by the respondents to him at that price on January 22, 1912, and delivered to him on or about that date.

On February 9, 1912, the appellants commenced an action against the respondents for an injunction and damages in respect of the breach of the agreement of January 2, which they claimed to be an agreement made between the respondents and the appellants through Messrs. A. J. Dew & Co. as their agents.

The respondents by their re-amended defence alleged inter alia that the agreement was made between the respondents and A. J. Dew & Co. on their own account and not as agents for the appellants, and that the respondents never contracted with the appellants at all.

Phillimore J. gave judgment for the appellants for 10*l*., the liquidated damages in respect of the two breaches above mentioned, and granted an injunction restraining the respondents from selling Dunlop motor tyres, covers, or tubes below the appellants' current list prices.

The Court of Appeal (Vaughan Williams, Kennedy, and Swinfen Eady L.JJ.) reversed this decision and gave judgment for the respondents. They held that the contract of January 2 was not a contract between the appellants and the respondents at all, but was a contract between Messrs. A. J. Dew & Co. and the respondents only, and that Messrs. A. J. Dew & Co. were not legally competent at one and the same time to make a contract with the respondents by themselves as principals and as agents of the appellants. They therefore held that the action was not sustainable.

1915. March 23, 25. *Younger*, *K.C.*, and *Disturnal*, *K.C.*, for the appellants. 1. The appellants are undisclosed principals. Although the agreement sued on was addressed to A. J. Dew & Co. they were acting as agents of the appellants and were known by the respondents to be so acting. The fact that the expressed consideration is to be paid by A. J. Dew & Co. does not preclude them from saying that they are agents. An agent may make a payment under a contract out of his own pocket without losing his character as agent: *Phelps* v. *Prothero*. (1)

2. There was in fact a consideration moving from the appellants to the respondents, and this consideration may be proved by parol evidence. These price maintenance agreements deal with proprietary articles, and A. J. Dew & Co., as the respondents well knew, were under contract to the appellants not to supply these articles to trade customers on trade terms except on condition of exacting from those customers an undertaking to observe the appellants' list prices.

The consideration moving from the appellants to the respondents is that the appellants, with the knowledge of the respondents, permit A. J. Dew & Co. to sell tyres to the respondents on favourable terms and that the respondents take advantage of

(1) (1855) 16 C. B. 370.

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those terms. But for the intervention of the appellants the respondents could not have got the goods on those terms at all. And if there is this additional consideration in fact parol evidence of it is admissible, for such evidence does not contradict the contract: *Frith* v. *Frith* (1), approving *Clifford* v. *Turrell.* (2)

Sir Robert Finlay, K.C., *Sanderson, K.C.*, and *Herbert L. Tebbs*, for the respondents, were not called on.

The House took time for consideration.

April 26. VISCOUNT HALDANE L.C. My Lords, in my opinion this appeal ought to fail.

Prior to January 2, 1912, Messrs. Dew had entered into a contract with the appellants to purchase a quantity of tyres and other goods from them at the prices in their list, in consideration of receiving certain discounts. As part of their contract Messrs. Dew undertook, among other things, not to sell to certain classes of customer at prices below the current list prices of the appellants. They were, however, to be at liberty to sell to a class of customer that included the respondents at a discount which was substantially less than the discount they were themselves to receive from the appellants, but in the case of any such sale they undertook, as the appellants' agents in this behalf, to obtain from the customer a written undertaking that he similarly would observe the terms so undertaken to be observed by themselves. This contract was embodied in a letter dated October 12, 1911.

On January 2 the respondents contracted with Messrs. Dew, in terms of a letter of that date addressed to them, that, in consideration of the latter allowing them discounts on goods of the appellants' manufacture which the respondents might purchase from Messrs. Dew, less, in point of fact, than the discount received by the latter from the appellants, the respondents, among other things, would not sell the appellants' goods to private customers at prices below those in the appellants' current list, and that they would pay to the appellants a penalty for every article sold in breach of this stipulation.

The learned judge who tried the case has held that the respon-

(1) [1906] A. C. 254. (2) (1841) 1 Y. & C. Ch. 138.

dents sold goods of the appellants' manufacture supplied through Messrs. Dew at less than the stipulated prices, and the question is whether, assuming his finding to be correct, the appellants, who were not in terms parties to the contract contained in the letter of January 2, can sue them.

My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognized in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it.

My Lords, in the case before us, I am of opinion that the consideration, the allowance of what was in reality part of the discount to which Messrs. Dew, the promisees, were entitled as between themselves and the appellants, was to be given by Messrs. Dew on their own account, and was not in substance, any more than in form, an allowance made by the appellants. The case for the appellants is that they permitted and enabled Messrs. Dew, with the knowledge and by the desire of the respondents, to sell to the latter on the terms of the contract of January 2, 1912. But it appears to me that even if this is so the answer is conclusive. Messrs. Dew sold to the respondents goods which they had a title to obtain from the appellants independently of this contract. The consideration by way of discount under the contract of January 2 was to come wholly out of Messrs. Dew's pocket, and neither directly nor

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indirectly out of that of the appellants. If the appellants enabled them to sell to the respondents on the terms they did, this was not done as any part of the terms of the contract sued on.

No doubt it was provided as part of these terms that the appellants should acquire certain rights, but these rights appear on the face of the contract as jura quaesita tertio, which the appellants could not enforce. Moreover, even if this difficulty can be got over by regarding the appellants as the principals of Messrs. Dew in stipulating for the rights in question, the only consideration disclosed by the contract is one given by Messrs. Dew, not as their agents, but as principals acting on their own account.

The conclusion to which I have come on the point as to consideration renders it unnecessary to decide the further question as to whether the appellants can claim that a bargain was made in this contract by Messrs. Dew as their agents; a bargain which, apart from the point as to consideration, they could therefore enforce. If it were necessary to express an opinion on this further question, a difficulty as to the position of Messrs. Dew would have to be considered. Two contracts—one by a man on his own account as principal, and another by the same man as agent—may be validly comprised in the same piece of paper. But they must be two contracts, and not one as here. I do not think that a man can treat one and the same contract as made by him in two capacities. He cannot be regarded as contracting for himself and for another uno flatu.

My Lords, the form of the contract which we have to interpret leaves the appellants in this dilemma, that, if they say that Messrs. Dew contracted on their behalf, they gave no consideration, and if they say they gave consideration in the shape of a permission to the respondents to buy, they must set up further stipulations, which are neither to be found in the contract sued upon nor are germane to it, but are really inconsistent with its structure. That contract has been reduced to writing, and it is in the writing that we must look for the whole of the terms made between the parties. These terms cannot, in my opinion consistently with the settled principles of English law, be

construed as giving to the appellants any enforceable rights as against the respondents.

I think that the judgment of the Court of Appeal was right, and I move that the appeal be dismissed with costs.

LORD DUNEDIN. (1) My Lords, I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce. Notwithstanding these considerations I cannot say that I have ever had any doubt that the judgment of the Court of Appeal was right.

My Lords, I am content to adopt from a work of Sir Frederick Pollock, to which I have often been under obligation, the following words as to consideration: "An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable." (Pollock on Contracts, 8th ed., p. 175.)

Now the agreement sued on is an agreement which on the face of it is an agreement between Dew and Selfridge. But speaking for myself, I should have no difficulty in the circumstances of this case in holding it proved that the agreement was truly made by Dew as agent for Dunlop, or in other words that Dunlop was the undisclosed principal, and as such can sue on the agreement. None the less, in order to enforce it he must show consideration, as above defined, moving from Dunlop to Selfridge.

In the circumstances, how can he do so? The agreement in question is not an agreement for sale. It is only collateral to an agreement for sale; but that agreement for sale is an agreement entirely between Dew and Selfridge. The tyres, the property in which upon the bargain is transferred to Selfridge, were the property of Dew, not of Dunlop, for Dew under his agreement with Dunlop held these tyres as proprietor, and not as agent. What then did Dunlop do, or forbear to do, in a question with Selfridge? The answer must be, nothing. He did not do

(1) Read by Lord Atkinson.

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anything, for Dew, having the right of property in the tyres, could give a good title to any one he liked, subject, it might be, to an action of damages at the instance of Dunlop for breach of contract, which action, however, could never create a vitium reale in the property of the tyres. He did not forbear in anything, for he had no action against Dew which he gave up, because Dew had fulfilled his contract with Dunlop in obtaining, on the occasion of the sale, a contract from Selfridge in the terms prescribed.

To my mind, this ends the case. That there are methods of framing a contract which will cause persons in the position of Selfridge to become bound, I do not doubt. But that has not been done in this instance; and as Dunlop's advisers must have known of the law of consideration, it is their affair that they have not so drawn the contract.

I think the appeal should be dismissed.

LORD ATKINSON. My Lords, the action out of which this appeal arises was brought by the appellants against the respondents to restrain the latter from selling or offering for sale certain goods manufactured by the appellants, on terms other than those specified in a certain agreement dated January 2, 1912, alleged to have been entered into between the respondents and the appellants through Messrs. A. J. Dew & Co. as the agents of the latter; and to recover the liquidated damages made recoverable by the terms of this agreement in respect of the breaches thereof complained of, and for an account of the goods sold in violation of the same.

The main facts of the case are undisputed. The appellants are large and well-known manufacturers of motor tyres, covers, and tubes, which are sold to the users of motor cars and other vehicles through their factors, and also through manufacturers of motor cars. Messrs. A. J. Dew & Co. were one of these agents or factors. They, like all the appellants' other agents or factors, entered into an agreement with them styled a price maintenance agreement. The particular agreement in the case of Dew & Co. bore date October 12, 1911. It, in substance, provided that in consideration of being allowed 10 per cent.

discount off the appellants' list prices for motor tyres, covers, and tubes current from time to time, for prompt monthly payment, and a discount of 25 per cent. off appellants' price list for certain other goods therein named, Dew & Co. agreed to purchase from them before the expiration of the month of September, 1912, goods of the above-mentioned character of the net value of 2000*l.*, with a further provision that if these purchases should, during the above-mentioned period, amount to 2000*l.* and all the conditions of the contract be observed by Dew & Co., the appellants should allow them a rebate of 9 per cent. on the net amount of cash paid by them.

The only conditions of the contract necessary to refer to are first, a provision that Dew & Co. should not sell or offer for sale any Dunlop motor tyres, covers, or tubes to any other person, firm, or company at prices less than these list prices; but should be at liberty to allow to persons legitimately engaged in the motor trade (other than co-operative societies) a discount not exceeding 10 per cent. off such list prices, plus the authorized scale of rebates on the net values of the purchases of the aforesaid goods, and further, that in case of any sale of any of the said goods to any such traders as aforesaid, Dew & Co. should, as the appellants' agents, obtain from each trader a written undertaking that he would similarly observe the list prices, terms, and conditions of sale on any resales made by him, whether to private customers or other traders, would forward these undertakings to the appellants on demand, and would not allow such trade discounts to any of the persons aforesaid without previously obtaining such a written undertaking; and, second, a condition that Dew & Co. should pay 5*l.* for every tyre, cover, or tube sold or offered for sale in breach of the conditions of the contract.

Now this agreement was an agreement for the sale and purchase of the appellants' goods, with certain contractional restrictions on the purchaser's right of resale. Dew & Co., unless restrained by injunction, could sell the goods they had purchased from the appellants to any sub-vendee on any terms they pleased, subject to this, that they exposed themselves to an action for breach of contract at the appellants' suit if they did not observe the terms of the agreement. But they did not

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require the special consent of the appellants to any particular resale made in conformity with the terms of the agreement. That consent was given in anticipation the moment the agreement was entered into. Dew & Co. were then clothed with absolute authority to resell on the terms specified in the agreement. The appellants had no power to prohibit or restrain them from doing so. I think it may be fairly assumed that the respondents were aware of the nature of this agreement between Dew & Co. and the appellants.

When one turns to the contract relied upon, namely, the letter dated January 2, 1912, drawn up by Dew & Co., and signed on behalf of the respondents by A. Horsfield, it is clear that Dew & Co. did introduce into it, in substance, all the stipulations they were bound by their contract with their principals to introduce. They did nothing which that contract did not authorize. They merely exercised their right to resell on the terms prescribed. It was contended by the appellants' counsel, as I understood them, that the discount of 10 per cent. having been given to the respondents, it must be taken that the appellants gave a specific and special consent to this particular contract with the respondents, and that that special consent constituted a consideration, moving from the appellants to the respondents, sufficient to support the contract contained in the letter of January 2, 1912 as a contract between the appellants and the respondents. In my opinion that contention is entirely unsustainable.

It was also urged on behalf of the appellants that it was competent for the latter to show that Dew & Co. entered into this contract of January 2, 1912, as agents for undisclosed principals, namely, the appellants in the present action.

Even if that were so, and the appellants were to be treated as parties to the contract contained in this letter, it does not get over the difficulty. The contract is as to them a nudum pactum, since no consideration moves from them to the respondents, or to any other person or body at the respondents' request.

I confess that the inclination of my opinion is that this case comes within the principle of the decision in *Humble* v. *Hunter* (1), and that consistently with the terms of the letter itself the

(1) (1848) 12 Q. B. 310.

appellants cannot claim to be principals on whose behalf Dew & Co. contracted as their agents. Kennedy L.J. has pointed out in his judgment the different stipulations in the contract which are irreconcilable with the supposition that Dew & Co. did not contract as principals. But however this may be, it is, I think, clear that no consideration moved from the appellants to support any contract made with them and the respondents, and I prefer to base my judgment on that ground.

I think, therefore, that the judgment appealed from was right, and this appeal should be dismissed with costs here and below.

LORD PARKER OF WADDINGTON. (1) My Lords, even assuming that the undertaking upon which this action is founded was given by the respondents to Messrs. A. J. Dew & Co. as agents for the appellants, and was intended to enure for their benefit, the appeal cannot succeed unless the undertaking was founded on a consideration moving from the appellants, and in my opinion there was no such consideration. The appellants did not give or give up anything on the strength of the undertaking. They had sold tyres to Messrs. A. J. Dew & Co. on the terms that the latter should not resell them at prices less than those specified in the appellants' price list, except that Messrs. A. J. Dew & Co. were to be at liberty to allow to persons legitimately engaged in the motor trade a certain discount off such price list, if they, as agents for the appellants, obtained from such persons a written undertaking such as that upon which this action is founded. In reselling these tyres to the respondents, and obtaining from the respondents the undertaking in question, Messrs. A. J. Dew & Co. admittedly committed no breach of contract. The sale was, of course, a good consideration for the undertaking moving from Messrs. A. J. Dew & Co., but the appellants, in whose favour the undertaking was given, being in the position of volunteers not parties to the contract of sale, cannot sue on it. The case was argued on behalf of the appellants as though what was done by Messrs. A. J. Dew & Co. would have been unlawful but for the leave and licence of the

(1) Read by Lord Sumner.

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appellants, and that such leave and licence, though general in form, must be taken as given on the occasion of each sale, in consideration of the undertaking. I cannot accept this contention. In the first place, it is wrong to speak of an exception from a restrictive contract as importing any leave or licence at all. But for any contract to the contrary, Messrs. A. J. Dew & Co. were entitled to resell the goods supplied to them by the appellants upon any terms they might think fit, and in reselling as they did there was no breach of any restrictive contract. Even, however, if the sale can be considered as lawful only by licence of the appellants, the licence was given once for all in their contract to Messrs. A. J. Dew & Co., and was not given as part of the terms upon which any particular sale was allowed.

The appeal fails on this ground and should be dismissed with costs.

LORD SUMNER. My Lords, there are two instances of sale and delivery complained of in this case. The steps in the Jameson transaction are as follows. Those in the other, the Strauss transaction, are similar, and need not be analysed. On October 12, 1911, Messrs. Dew & Co., motor accessory factors, contracted with the appellants, the Dunlop Pneumatic Tyre Company, in terms of the latter's price maintenance agreement then current. By this contract Messrs. Dew & Co. became bound, inter alia, to buy from the Dunlop Company motor tyres, covers, tubes, and sundries to the net value of 2000*l.* before the expiration of September, 1912, and the appellants became bound, if the contract continued to subsist, as it did, to sell and deliver such goods up to that value, whenever reasonably required to do so.

On December 21, 1911, a Captain Jameson thought fit to ask the respondents, Messrs. Selfridge & Co., Limited, who are described as wholesale and retail merchants, for their lowest price for a Dunlop motor tyre, grooved and non-skid, 815 by 105. Their answer was that, on receipt of his order, such a tyre would be procured and the price would be 5*l.* 18*s.* 2*d.*, which was the appellants' list price, less 7½ per cent.

On January 1, 1912, Captain Jameson sent to the respondents

an order for the tyre, and also the money for it, and on the same day the order was accepted, and delivery of the tyre was promised for the following day. In fact, on January 2 the respondents ordered this tyre from Messrs. Dew & Co. by telephone. Messrs. Dew & Co., in turn, ordered it by telephone from the appellants; it was delivered by them to Messrs. Dew & Co., and they sent it to the respondents. These were the events of January 2. On the next day the respondents delivered it to Captain Jameson. Of course the respondents did not mention Captain Jameson to Messrs. Dew & Co., nor did Messrs. Dew & Co. mention the respondents to the appellants.

So far the respondents had signed no price maintenance agreement. They had been pressed to do so, and no doubt knew that the reason why they were being pressed by Messrs. Dew & Co. was because the appellants, in turn, strictly required them to obtain these agreements from those of their customers to whom they sold. Within two or three days of January 3 they did sign such an agreement, dating it January 2, and delivering it to Messrs. Dew & Co., to whom it was addressed, a week or so afterwards. It is for breach of this agreement that the appellants sued.

The parties have been desirous of knowing their reciprocal rights and duties, if any, arising out of this agreement, and have accordingly raised two broad questions: (1.) Is there any agreement between these parties at all? (2.) If so, is there any consideration moving from the appellants to support it and make it bind the respondents to them? But for this there would have been a good deal to be said for the proposition that a bargain and sale, clearly complete before this agreement was signed or dated, could be no breach of it, and that the performance of that bargain by delivery of the goods after the price maintenance agreement was made could hardly be a ground for the grant of an injunction.

My Lords, let it be assumed without discussion that the agreement which the respondents signed speaks from its date, January 2. Let it be assumed also that evidence was admissible to add an unexpressed consideration moving from the appellants to the expressed consideration moving from Messrs. Dew & Co. Let it be assumed further (though this is a large assumption) that

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the terms of the instrument do not so designate Messrs. Dew & Co. as the principals and the only contracting parties as to shut out proof that the appellants were their undisclosed principals. After all, what consideration moved from the appellants?

As the point is not insisted on that Messrs. Dew & Co. sold and delivered to the respondents first, and procured their written undertaking only afterwards, I think that Messrs. Dew & Co. exactly performed the conditions of their agreement with the appellants. The firm of Selfridge & Co. was the "trader" within that agreement, and Messrs. Dew & Co. duly obtained that firm's written undertaking to the intent therein described. The undertaking was in the appellants' own form, and Messrs. Dew & Co. did not contract even by implication that the undertaking which they would obtain should be binding.

The respondents signed what they were asked to sign, but nothing precluded them from saying afterwards that it was nudum pactum. At first they thought and said that they were bound, but this did not alter their position or the appellants', or supply a consideration where none existed before. They made no request for the tyre to the appellants, for they did not know that Messrs. Dew & Co. had not got it in stock, or, if they knew, they did not constitute Messrs. Dew & Co. their agents to ask the appellants for it. Messrs. Dew & Co. asked for it by virtue of their agreement to buy up to 2000*l.* worth of goods, and so it was that the appellants delivered it.

Messrs. Dew & Co. did not mention to the appellants that so far no written undertaking had been signed by their customer, and the appellants, knowing nothing, waived nothing. The appellants, as alleged promisees, neither did nor suffered nor forbore anything, nor promised to do any of these things or anything at all, in exchange for the undertaking purporting to be given by the respondents. It was contended that consideration might be found in the fact that the appellants, who could sell or not sell their own proprietary products, as they chose, only enabled the respondents to get the tyres by agreeing to supply Messrs. Dew & Co., and only agreed to supply them on the restrictive terms in question. This breaks down as soon as it is examined. To this transaction the respondents were

strangers. It happened before they received or gave any order. The delivery of the tyres by the appellants was in performance of an obligation unknown to the respondents (though I daresay they could have surmised it if it had been any business of theirs) and prior to their appearance on the scene. In this transaction nothing moved from the appellants to the respondents. It would have been the same if the other firm had not existed. The appellants have sued on a nudum pactum.

My Lords, the appellants' "distributing organization" has been before your Lordships' House before, and I do not suppose you have heard the last of it now. I think it better, accordingly, to express no opinion on any of the other questions that have been raised, since this one decides the case, and the others may occur again. Much may be said both ways on the right of the appellants to come forward as undisclosed principals upon the contract in question. I express no opinion except that I do not wish to be supposed entirely to assent to the broad proposition, apparently suggested in some of the judgments of the Lords Justices, that a contract, in which one and the same party contracts both on his own behalf and for an undisclosed principal, is a legal impossibility. So stated I think the proposition somewhat too wide. If no more is meant than what Swinfen Eady L.J. puts, "where a party contracts in his own name, an undisclosed principal cannot sue on the contract, if the terms are such as import that the person so signing is the real and only principal," it is not open to objection.

I think that the appeal should be dismissed.

Lord Parmoor. My Lords, the main question in this appeal is whether it is competent for the appellants to bring an action to enforce certain conditions in a contract made between the respondents and Messrs. A. J. Dew & Co. The appellants are manufacturers and Messrs. A. J. Dew & Co. are factors and dealers in motor tyres, covers, or tubes. It is the object of the appellants to enforce and maintain certain general conditions and prices in the sale of their motor tyres, covers, or tubes, and it may be assumed that it is important for their business to attain this object.

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The appellants are not in form parties to the contract which they seek to enforce. They claim to be undisclosed principals. If they can prove this, they get over the first difficulty. Unless the appellants can prove that they are undisclosed principals, they fail at the outset, since the stipulations which they seek to enforce are not of such a character that a person, not a party to the contract, has a right to bring an action to enforce them.

There is no question that parol evidence is admissible to prove that the plaintiff in an action is the real principal to a contract; but it is also well established law that a person cannot claim to be a principal to a contract, if this would be inconsistent with the terms of the contract itself.

Kennedy L.J. in his judgment in the Court of Appeal states his conclusion that it would be inconsistent with the terms of the contract itself to admit the claim of the appellants to be regarded as undisclosed principals with a consequent right to bring an action to enforce certain of its conditions. I agree with this conclusion, and it is sufficient to dispose of the case. A further difficulty in the way of the appellants is that, apart from any question of form, they cannot show that there is any consideration sufficient to support a contract as between themselves and the respondents. On October 12, 1911, the appellants entered into a contract with Messrs. A. J. Dew & Co. that in consideration of discounts and rebates being allowed off the appellants' current price list they would purchase from the appellants goods to the quantity therein mentioned. There were several conditions attached to the contract, among them the following: "We will, as your agents in this behalf, in the case of any sale of your tyres, covers, or tubes to a trader obtain from such trader a written undertaking that he will similarly observe your list prices, terms, and conditions of sale current at the time of sale in any resales by him."

In accordance with this obligation, Messrs. A. J. Dew & Co. did make a contract with the respondents that they would similarly observe the appellants' prices, terms, and conditions of sale current at the time of any sale by them. There is no dispute that the respondents did not observe the conditions attached to their contract with Messrs. A. J. Dew & Co. The

appellants, in their action, claimed an injunction and damages at the rate of 5*l.* for each and every tyre, cover, or tube sold by the respondents in breach of the said agreement.

I understood Mr. Younger, in his argument on behalf of the appellants, to say that the appellants, under the contract between themselves and Messrs. A. J. Dew & Co. of October 12, 1911, reserved some control over the sale of their goods by Messrs. A. J. Dew & Co. to third parties, and that in this respect there was consideration moving from the appellants to the respondents sufficient to support a contract.

I am of opinion that no such control was reserved to the appellants, and that Messrs. A. J. Dew & Co., without any further authority or licence from the appellants, had a full right, as factors or dealers in the appellants' goods, to sell them to the respondents. It may well be that the appellants under their contract with Messrs. A. J. Dew & Co. have the power to prevent the supply of the appellants' goods to any person whose supplies the appellants request Messrs. A. J. Dew & Co. to suspend, but this is a wholly different proposition from a claim to be entitled to bring an action against the purchasers of goods sold by Messrs. A. J. Dew & Co. in the course of their business.

If Messrs. A. J. Dew & Co. had full power to sell the goods in question to the respondents, as factors or dealers, it is, I think, clear that the appellants were not in a position to give, and did not give, any consideration which could support a contract between themselves and the respondents, and that the action fails.

I abstain from discussing what remedy Messrs. A. J. Dew & Co. might have on their contract with the respondents, or whether the appellants might not have attained their object in some other way; it is sufficient to say that the appellants cannot succeed in their present action and that the appeal fails.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 26, 1915.

Solicitors for appellants: *John B. & E. Purchase.*
Solicitors for respondents: *Nunn, Popham & Starkie.*

[PRIVY COUNCIL.]

J. C.* 1915

June 25, 28; July 8.

DUNCAN RUTHERFORD . . . . . APPELLANT;

AND

WILLIAM ACTON-ADAMS . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Specific Performance—Vendor and Purchaser—Decree with Compensation—Deficiency in Subject-matter—Misrepresentation.

The right of a purchaser of land to obtain a decree for specific performance of the contract with compensation applies only where there is a deficiency in the subject-matter described in the contract. It does not apply to a claim based upon a representation made not in the contract but collaterally to it. In the latter case the remedy is rescission, or a claim for damages for deceit where there is fraud, or for breach of a collateral contract if there has been one.

The circumstances in which the Court will decree specific performance with compensation stated.

APPEAL from a judgment of the Court of Appeal of New Zealand (January 31, 1914).

By an agreement in writing dated July 8, 1911, the respondent agreed to sell and the appellant agreed to purchase certain freehold and leasehold lands in New Zealand for 15,000*l.*, and the live stock and effects thereon for a further 26,500*l.* The agreement, after reciting that 2000*l.* had been paid as deposit, provided for the payment of a further 8000*l.* upon certain consents to the transfer of the leaseholds being obtained, for the payment of the balance of the purchase-money with interest on June 30, 1912, and that upon payment of the balance of the purchase price and interest the respondent should execute proper assurances of the freeholds. Shortly after the payment of the deposit the appellant went into possession, and by March, 1912, he paid the 8000*l.*, whereupon, under the terms of the agreement, the leaseholds were transferred.

Before June 30, 1912, the date fixed for completion, the appellant put forward the claim alleging that in the course of the

* *Present:* VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

negotiations the amount of the fencing on the land had been innocently represented by the respondent's agent to be 232 miles, whereas in fact there were only 164 miles, and he claimed to deduct 3570*l.* from the balance of the purchase price in respect of this deficiency. The agreement was silent as to the amount of fencing.

By letters dated June 27 and July 1, 1912, between the solicitors for the appellant and respondent it was in effect agreed that the completion should take place upon payment of the balance of the purchase price less the 3570*l.* claimed, but that the completion should be without prejudice to the rights of the parties respectively.

On July 5, 1912, the respondent commenced an action against the appellant to recover the 3570*l.*, as the balance of the purchase price and interest. The appellant by his defence alleged a misrepresentation and breach of warranty as to the quantity of fencing and counterclaimed for the 3570*l.* No fraud was alleged, and the claim for a breach of warranty was subsequently abandoned.

The action was heard by Denniston J., and the respondent's subsequent motion for judgment was removed into the Court of Appeal to decide questions of law raised on the evidence. For the purpose of the argument it was agreed that there were only 164 miles of fencing.

The Court of Appeal (Stout C.J., Williams and Cooper JJ., Edwards J. dissenting) gave judgment for the respondent and dismissed the appellant's counter-claim. The proceedings are reported at 33 L. R. N. Z. 774.

Cave, K.C., and *Percy Wheeler*, for the appellant. Having regard to the agreement between the solicitors to the parties, the action ought to be treated as if it were brought by the respondent for specific performance. Upon a vendor's action for specific performance a decree will be made subject to the payment of compensation for misrepresentation, although the deficiency alleged is not in a quantity stated in the contract: *Grant* v. *Munt* (1); *Powell* v. *Elliott.* (2) Neither of those cases

(1) (1815) G. Coop. 173. (2) (1875) L. R. 10 Ch. 424.

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was one of fraud. *Schmidt & Bellshaw* v. *Greenwood* (1) so far as it held the contrary of the appellant's contention was wrongly decided.

[VISCOUNT HALDANE referred to *Rudd* v. *Lascelles*. (2)]

The completion was without prejudice to the rights of the parties, and before completion the vendor could only sue for specific performance: *Laird* v. *Pim*. (3) [Fry on Specific Performance, 4th ed., pars. 1227 and 1252, was also referred to.]

VISCOUNT HALDANE. The Board wish to hear the respondent's counsel only as to the respondent's right to sue for the price before completion.

George Wallace, K.C., and *J. M. Paterson*, for the respondent. *Laird* v. *Pim* (3) is distinguishable as in that case payment was by the agreement to be made "as soon as the conveyance was completed." Where the agreement fixes a definite date for payment and does not postpone it till after completion, the vendor can sue on or after that date for the purchase price although completion has not taken place: *Mattock* v. *Kinglake* (4); *Dicker* v. *Jackson* (5); *Lindsay* v. *Direct London and Portsmouth Railway* (6); *Yates* v. *Gardiner*. (7) If there is any defect of title the purchaser can plead that the vendor was not ready and willing to convey. In the present case the action was commenced after the date fixed for payment and the agreement provides that completion shall take place upon payment.

Percy Wheeler replied.

1915 *July* 8.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The real question in this case is whether the appellant, the purchaser of a large tract of land, can, after entering into possession and taking a conveyance, claim compensation for misrepresentation as to the mileage of fencing on the land. The contract was silent as to the fencing, but it is contended that on this subject the respondent's agent made a material misrepresentation as to the mileage which induced

(1) (1912) 32 L. R. N. Z. 241.
(2) [1900] 1 Ch. 815.
(3) (1841) 7 M. & W. 747.
(4) (1839) 10 Ad. & E. 50.
(5) (1848) 6 C. B. 103.
(6) (1850) 19 L. J. (Q.B.) 417.
(7) (1851) 20 L. J. (Ex.) 327.

the appellant to enter into the contract. Their Lordships will proceed on the assumption that this was so. As, shortly after the payment of the deposit, the purchaser entered into possession and has taken profits, rescission is now impossible. It is equally true that as there is no charge made of fraudulent misrepresentation, no claim can be made for damages for deceit. The only possible remedy open to the appellant as purchaser is to claim compensation against the vendor for the deficiency in the mileage of fencing by invoking the well-known jurisdiction of a Court of Equity in cases of specific performance to order compensation for discrepancy between what was agreed to be conveyed and what can be conveyed.

But their Lordships are in agreement with the majority of the learned judges of the Court of Appeal of New Zealand in thinking that the case is one to which this remedy has no application. Under the agreement the balance of the purchase-money was to be paid on June 30, 1912, and upon payment the vendor was to convey. The purchase-money had all been paid excepting two sums of 3400*l.* and 170*l.* (being interest), which had been retained by the purchaser to meet his claim for compensation for the deficiency. The purchaser's solicitors had written a letter, dated July 1, 1912, in which they proposed that on payment of the rest of the purchase-money remaining unpaid the vendor should convey without prejudice to his right of action for the two sums referred to, and they tendered the conveyance for execution without prejudice to their client's claim for shortage of fencing. The proposal was carried out. The result was, in their Lordships' opinion, that the vendor had under the contract a valid claim at law for payment of the 3400*l.* and the 170*l.* They are further of opinion that the purchaser cannot counterclaim for compensation. They have examined the cases on the point decided both in this country and in the Courts of New Zealand. The result of this examination is to satisfy them that the principle which applies ought to be laid down as follows. In exercising its jurisdiction over specific performance Court of Equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey

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substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and where the Court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing the Court holds him to have an even larger right. Subject to considerations of hardship he may elect to take all he can get, and to have a proportionate abatement from the purchase-money. But this right applies only to a deficiency in the subject-matter described in the contract. It does not apply to a claim to make good a representation about that subject-matter made not in the contract but collaterally to it. In the latter case the remedy is rescission, or a claim for damages for deceit where there has been fraud, or for breach of a collateral contract if there has been such a contract.

Their Lordships have arrived at the conclusion that as rescission cannot now be asked for, and as there is no such collateral contract as has been referred to, the claim of the purchaser, the appellant, fails. They cannot find in the letter which they have mentioned anything which gives him a new or different right. They will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Steavenson & Couldwell.*
Solicitors for respondent: *Hawes, Wood & Ware.*

[PRIVY COUNCIL.]

CANADIAN PACIFIC RAILWAY COMPANY Appellants;

AND

FRÉCHETTE . . . . . Respondent.

J. C.*
1915
May 6, 7, 13;
June 25.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE)

Canada (Quebec)—Negligence—Both Parties negligent—Faute Commune—Negligence of Plaintiff Sole Effective Cause.

By the law which prevails in the Province of Quebec in actions for negligence where both parties have been in fault damages are awarded proportionate to the degree in which the respective parties are to blame; where, however, the sole effective cause of an accident is the plaintiff's own negligence he is not entitled to recover any damages.

Appeal from a judgment of the Court of King's Bench for Quebec (Appeal Side), March 9, 1914, affirming a judgment of the Superior Court, November 28, 1913.

The respondent, who was a brakesman in the employment of the appellants, was injured on October 13, 1912, while uncoupling cars on the wharves at Princess Louise Basin in the harbour of Quebec.

The respondent sued the defendants in the Superior Court, Quebec, claiming $15,000 damages for negligence. The facts appear from the judgment of their Lordships.

The action was tried before Dorion J. and a jury. The effect of the jury's finding (which is set out in the judgment) was that the accident was due to the common fault of the respondent and the appellants' servants. The faults attributed to the appellant by the verdict were: (1.) not instructing the respondent; (2.) allowing "running-shunts" on a dark night without light; (3.) that the coupling apparatus was out of order; (4.) not stopping the work when the lights went out. The fault attributed to the respondent was imprudence in going between the cars to uncouple them. The jury found damages for the full

* *Present*: Viscount Haldane L.C., Lord Dunedin, and Lord Atkinson.

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amount claimed, $15,000, and reduced the verdict by $3000 by reason of the respondent's fault.

On the motion of the appellants the case was reserved for the consideration of the Court of Review under the Civil Procedure Code of Lower Canada, art. 491. The Court of Review gave judgment on the verdict, dismissing the present appellants' motion for a nonsuit or in the alternative for a new trial. The appellants appealed to the Court of King's Bench (Appeal Side), asking that the action be dismissed or a new trial granted. The appeal was dismissed by a majority of the Court consisting of Archambeault C.J. with Carroll and Gervais JJ., Lavergne and Cross JJ. dissenting.

Sir Robert Finlay, K.C., and *G. G. Stuart, K.C.* (*Geoffrey Lawrence* with them), for the appellants. The principles of the jurisprudence of Quebec as to damages for negligence where there has been a common fault on the part of both the plaintiff and the defendant appear from the judgments in *George Matthews Co.* v. *Bouchard* (1) and *Nichols Chemical Co. of Canada* v. *Lefebvre*. (2) In the last cited case Sir C. Fitzpatrick C.J. said: "where the party who claims compensation for an injury caused by the fault of another has also been guilty of fault which contributed to the accident, he must share the responsibility, and in that case the damages are not divided equally as in the English Admiralty Court (3) . . . . but the plaintiff is awarded only a proportion varying according to the degree in which the respective parties were to blame." [Dalloz' Jurisprudence Générale, Supplément, tome 15 "responsabilité"; Demolombe's Cours. Traité des Contrats, tome 8, lib. 3, tit. 4, ch. 2, arts. 502 and 503; and Code Napoléon, arts. 1382 and 1383, were also referred to.] In the present case the accident was due solely and directly to the plaintiff's own negligence in going between the cars. There was no evidence to support the findings of negligence against the appellants. But in any case neither of the faults found by the jury on the part of the appellants was a cause of the accident. Under the law of Quebec, as under English law, where the plaintiff's own

(1) (1898) 28 Can. S. C. R. 580.
(2) (1909) 42 Can. S. C. R. 402.
(3) See, however, Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57).

negligence is the cause of the accident he is not entitled to recover, although the defendant may at an earlier stage have been guilty of negligence. [*Davies* v. *Mann* (1), *Radley* v. *London and North Western Ry. Co.* (2), and *H.M.S. Sans Pareil* (3) were referred to.] There is no faute commune unless the accident is caused by the negligence of both parties. Negligence which is not a cause of the accident is immaterial.

Leslie Scott, K.C., and *J. N. Francœur*, for the respondents. The principle of the English cases as to contributory negligence cannot be applied without modification in Quebec. The rule as to proportionate damages prevailing in that Province presupposes that more than one negligent act may be the effective cause of an accident. The inquiry necessary in England as to whether the negligence of the plaintiff or that of the defendant is the effective or decisive cause is excluded in Quebec, it being left to the jury to apportion the blame between the parties and to assess the damages accordingly. In the present case the plaintiff's negligence in going between the cars was not the sole cause. The real and effective cause was the negligent system with regard to uncoupling in use upon the appellants' railway. The respondent was bound by his employment to act in accordance with that system. [*Sword* v. *Cameron* (4), *Bartonshill Coal Co.* v. *Reid* (5), *Smith* v. *Baker* (6), and *Shawinigan Carbide Co.* v. *Doucet* (7) were referred to.]

Sir R. Finlay, K.C., replied.

The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the Court of King's Bench of Quebec (Appeal Side), dated March 9, 1914, confirming the judgment of the Superior Court, sitting in review, dated November 28, 1913, whereby damages amounting to the sum of $12,000 were, in accordance with the verdict of the jury which tried the case, awarded to the respondent in respect of personal injuries sustained by him through the

(1) (1842) 10 M. & W. 546.
(2) (1876) 1 App. Cas. 754.
(3) [1900] P. 267.
(4) (1839) 1 S. S. C. (2nd ser.) 493.
(5) (1858) 3 Macq. 266.
(6) [1891] A. C. 325.
(7) (1909) 42 Can. S. C. R. 281.

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negligence of the appellants, while he was engaged in working as a brakesman shunting a freight car or waggon on the line at Princess Louise Basin at Quebec. This line and the electrical apparatus for lighting it belong to and are controlled by the Commissioners of Quebec Harbour.

By s. 264 of the Canadian Railway Act, 1906, it is provided that "Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means . . . . (*c*) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars."

In obedience to this enactment the appellants have equipped most of their freight cars at each end with a certain coupling and decoupling machine called the Tower coupler. It is unnecessary to describe in detail the mechanism of these machines further than to say that the portion of each called the knuckle, designed for coupling the cars by impact, is kept close and in position by an iron pin or peg which fits into a sheath or socket in the knuckle, and that when this pin is withdrawn from its sheath the knuckle opens and the cars, theretofore coupled together, become detached from each other. These pins are each attached to one end of a lever fixed to the car. The other end or handle of the lever projects beyond the side of the car to such an extent that it can be worked so as to raise the pin by a person standing on the permanent way but clear of the car. The fore and aft levers of each car project beyond opposite sides of the car. If that on one end of the car projects beyond its left side, that on the other end projects beyond its right side. It was not disputed that when there is a strain on the coupling mechanism, which may happen in many ways, the pin may be nipped so tightly by the knuckle that it cannot be withdrawn by the action of the lever, and that it is only at a moment when there is what is called a "slack" between the cars that the pin does not stick, and can be readily withdrawn by the action of the lever. But it was clearly proved, and was not, their Lordships think, seriously disputed, that this sticking of the pin does

not show that the coupling machine is a defective machine. Strain will admittedly cause the pin to stick however perfect the machine may be.

The respondent was twenty-seven years of age at the time of the accident, was educated and intelligent. He had been about three months in the employment of the appellant company as a spare brakesman, that is one who may be discharged in the slack season if no berth be found for him at some other place on the line.

On October 13, 1912, he had work through the night. The electric lights on the jetty were extinguished about 1.30 A.M., but the men who were at work on the railway were furnished with lamps such as brakesmen use, good of their kind. About 5 o'clock in the morning of this day an engine, with fourteen or fifteen waggons, bound for three different destinations, attached, was standing on one of the sets of rails on the main line. It became necessary to divide up this train and shunt those of the cars destined for Winnipeg into one siding, those destined for Vancouver into another, and those destined for Montreal into a third. The car furthest from the engine was to be shunted into the Winnipeg siding. The respondent was aware of all this and was helping in the very work under the superintendence of a foreman named Ernest Tremblay. The respondent threw over the switch lever which was situated on the north side of the line of rails upon which the engine and cars were standing in order to let this foremost car pass into the Winnipeg siding, and, having done so, he recrossed the line to its south side. The engine was then pushing the car for Winnipeg up towards the points thus set, at a speed of about three miles an hour. Tremblay signalled to the engine driver to stop the train, and then (at what interval of time is not clear) ordered the respondent to uncouple this truck. This the respondent proceeded to do. He tried to do it several times with the aid of the lever, but found that the pin was fixed and the machine would not work. He then, while the train was in motion, went in between the Winnipeg waggon and the succeeding waggon to endeavour to work the lever on the opposite side of the succeeding car. This he clearly deposes to. He failed to uncouple the cars. As he walked

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along between the cars his foot caught in the points, he was knocked down by the succeeding car and carried about twenty-five feet over the switches, when all the cars came to a standstill. He crawled out from under the cars. Tremblay then came to his aid and found him badly injured.

The only negligence on the part of the appellants relied on by the respondent in his declaration was, first, their negligence in permitting this shunting to be done in the absence of light, and secondly, their negligence in providing a defective coupling machine. But the pleadings developed; much new matter was introduced, and new issues raised upon it.

The appellants in their answer, in addition to traversing the material averments in the declaration, pleaded: (1.) that the accident was solely due to the respondent's own negligence, and that they were not guilty of any fault or negligence whatever; (2.) that the coupler attached to this car was a patent coupler of approved design, and was in good order; (3.) that there was no necessity for the respondent to have gone in between the cars for the purpose of uncoupling them; (4.) that even if it were necessary for him so to do, he should have given notice of this intention, and was bound to wait till the cars had stopped before attempting to enter between them while moving, and that this was a grossly negligent act on his part, forbidden by the orders of the company; (5.) that if he had any difficulty in working the coupler he should have signalled to the engine-driver, as he had a right to do, to stop the cars, and should have given the signal to start again only after he had got clear of the cars; (6.) that the appellants were not responsible for the want of light; and (7.) that its absence was not the cause of the accident.

The respondent replied to this answer by traversing its material averments, and pleading: (1.) that it was necessary for him to go in between the cars to get the pin out and make the knuckle work, and that in so doing he had acted in the circumstances as all the other employees of the company act, and according to the practice followed not only on the appellants' line of railway, but on all other railways; and (2.) that in doing what he did he conformed to the rules of the company, and the

directions of his superior employees, namely, the yard master, John Vachon, and the foreman, Ernest Tremblay.

On these pleadings the case went to trial. The learned judge who tried the case left seven questions to the jury. The five following, with the answers to them, are alone of importance on this appeal. They run thus :—

"3. Is the said accident due solely to the fault and negligence of the plaintiff, and if so, in what did such fault and negligence consist ?—No.

"4. Is the said accident due solely to the fault and negligence of the defendants, their servants and employees, and if so, in what did such fault and negligence consist ?—No.

"5. Is the said accident due to the common fault and negligence of the plaintiff and of the defendants, their servants or employees, and if so, in what did the respective fault and negligence of each consist ?—Yes. The plaintiff was imprudent in going between the cars to uncouple them. The defendants were very much to blame for not instructing the brakesmen, as no rules were shown to the jury that had a direct bearing on a shunter's work in a yard, making up trains. Fréchette, after working all day, was called out to take Tweedell's place, who was hurt running to catch the engine in the dark. Tweedell fell and injured himself. Further, the defendants should not allow the shunters to make running shunts during a dark night when there was no light, only a signal lamp of about one candle power, which was principally used for signalling. Further, the coupling apparatus was proven to be out of order, and Fréchette, acting on orders from Tremblay to uncouple the car, tried to lift the pin on the other car. If there was a double lever attachment, it would not be necessary to do so. We find the defendants very negligent for not stopping the work when the lights went out.

"6. Has the plaintiff suffered damage by reason of this accident, and if so, for what amount ?—$15,000.

"7. If you replied affirmatively to question No. 5 what amount do you deduct from the damages suffered by the plaintiff ?—$3000."

The appellants rely strongly on the answer to this fifth question as proving that the jury were misdirected and misled

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by the learned judge in his charge, inasmuch as they appear to have based their verdict to a large extent upon what they supposed to be improper methods of managing the business of the railway adopted by the appellants. Even if this were so it was irrelevant, as these methods did not materially, or at all, contribute to the plaintiff's injury, and upon this ground, with others, the appellants contend that they are entitled at the least to have the verdict set aside and a new trial granted.

But their main attack was directed against the answer of the jury to the third question. They contend that the evidence clearly establishes that the respondent's own negligence was the sole effective cause of the injury he received; that having regard to that evidence, no reasonable man could find as the jury have, in fact, found in answer to this question; and that as it is a crucial question the verdict should be set aside and judgment be entered for them.

There is no doubt that the law of Quebec differs from the law of England on the question of contributory negligence properly so called. If one takes, for example, such a plea of contributory negligence as might be framed in conformity with the judgment by Wightman J. in *Tuff* v. *Warman* (1), to this effect: "That the plaintiff himself so far contributed to the misfortune by his own negligence that but for such negligence on his part the misfortune would not have happened, and the defendants could not by the exercise of ordinary care and caution upon their part have avoided the consequences of the plaintiff's negligence." Now that plea, if proved, would be a perfectly good defence in England: *Radley* v. *London and North Western Ry. Co.* (2) It would be no defence in Quebec. The jury in Quebec, notwithstanding the proof of it, would be entitled to inflict a kind of penalty upon the plaintiff on account of his own negligence, proportioned, presumably, in their opinion to his culpability, deduct that sum from what they would have awarded to him had he been blameless, and give him a verdict for the balance: *Nichols Chemical Co. of Canada* v. *Lefebvre.* (3) That is, in fact, what the jury have done in the present case.

(1) (1858) 5 C. B. (N.S.) 573, at p. 585. (2) 1 App. Cas. 754.
(3) 42 Can. S. C. R. 402.

But though this difference between the laws of the two countries on this subject does exist, it is equally certain that in Quebec, as in England, a plaintiff suing for damages in respect of an injury sustained by him cannot recover if his own negligence be the sole effective cause of that injury. In his judgment in *George Matthews Co.* v. *Bouchard* (1) Taschereau J. said: "There is no evidence whatever that the negligence of the company, assuming negligence to be proved, caused the accident in question, and an affirmance of the condemnation against it would unquestionably be at variance with our own jurisprudence."

The other members of the Court took a different view as to the existence of evidence of the defendant's negligence, but did not dispute this principle.

The ground of this distinction between the two cases is this: the latter is not, in the true sense of the term, a case of contributory negligence at all. That term can only be properly applied to a case where both the parties, plaintiff and defendant, are each guilty of negligence so connected with the injury as to be a cause materially contributing to it. If the negligence of either party falls short of this it is an irrelevant matter, an incuria, no doubt, but to use Lord Cairns' words, not an incuria dans locum injuriae. See Lord Bowen's judgment in *Thomas* v. *Quartermain* (2) and Lord Cairns' judgment in *Metropolitan Ry. Co.* v. *Jackson.* (3) [Their Lordships judgment, after setting out passages from the judgment of Lord Cairns at pp. 197 and 198, proceeded as follows:]

In reference to the right of a defendant, albeit guilty of negligence not amounting to incuria dans locum injuriae, to have a verdict directed for him where the plaintiff's negligence is the sole effective cause of the injury in respect of which he sues, the same great judge laid down the guiding principle of the English law applicable to it in a well-known passage of his judgment in the case of *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (4), where he says: "If a railway train, which ought to whistle when passing

(1) 28 Can. S. C. R. 580, at p. 584.
(2) (1887) 18 Q. B. D. 685.
(3) (1878) 3 App. Cas. 193.
(4) (1878) 3 App. Cas. 1155, at p. 1166.

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through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death. This would be an example of what was spoken of in this House in the case of *Metropolitan Ry. Co.* v. *Jackson* (1) as an incuria, but not an incuria dans locum injuriae. The jury could not be allowed to connect the carelessness in not whistling, with the accident to the man who rushed, with his eyes open, on his own destruction."

The principle thus laid down has been many times applied. It was applied in the case of *Davey* v. *London and South Western Ry. Co.* (2), and quite recently in the cases of *Macleod* v. *Edinburgh and District Tramways Co.* (3) and *Grand Trunk Railway* v. *McAlpine.* (4) In each of these cases the act upon which the risk of injury attended, and from which the injury sustained resulted, was done by the person who suffered the injury.

The question, therefore, which arose and was most discussed in the case of *Smith* v. *Baker* (5), namely, whether a man voluntarily incurred a risk attending his employment, where the act or negligence by which he was injured was the act or negligence of some person other than himself, did not arise in these cases. In cases such as *Smith* v. *Baker* (5) it must be shown (1.) that the plaintiff clearly knew and appreciated the nature and character of the risk he ran, and (2.) that he voluntarily incurred it. Until both are established, the maxim Volenti non fit injuria cannot apply. If, however, a person, with full knowledge and appreciation of the risk and danger attending a certain act, voluntarily does that act, it must be assumed that he voluntarily incurred the attendant risk and danger, and the maxim Volenti non fit injuria directly applies. Lord Halsbury pointed out this difference with great clearness. He said (6): "As I have intimated before, I do not deny that a particular consent may

(1) 3 App. Cas. 193.
(2) (1883) 12 Q. B. D. 70.
(3) 1913 S. C. 624.
(4) [1913] A. C. 838.
(5) [1891] A. C. 325.
(6) Ibid. at p. 338.

be inferred from a general course of conduct. Every sailor who mounts the rigging of a ship knows and appreciates the risk he is encountering. The act is his own, and he cannot be said not to consent to the thing he himself is doing. And examples might be indefinitely multiplied where the essential cause of the risk is the act of the complaining plaintiff himself, and where, therefore, the application of the maxim, Volenti non fit injuria, is completely justified."

The first question to be decided, then, resolves itself into this: Does the evidence show that the respondent's own negligence was the sole effective cause of the injury he sustained; that is, does it show that he, knowing the risk and danger of going in between cars in motion in order to uncouple them by means of this Tower coupler, voluntarily encountered that risk and danger, thereby sustaining the injuries he complains of? If he did so, then it must be held that there was no evidence before the jury upon which they could reasonably find as they have found in answer to question No. 3.

The presence or absence of evidence sufficient, in any given case, to support the finding of a jury as reasonable men is a matter upon which different minds may well come to opposite conclusions. The division of judicial opinion in the present case is proof of this. And every appellate tribunal, conscious of the great advantage enjoyed by a jury in having seen and heard the witnesses, and in having had the whole trial conducted under their observation, must feel reluctant to disturb the decision of such a tribunal. This applies in a special degree to this Board, which has to deal with the administration of justice in distant and dissimilar parts of the Empire, and has always desired to strengthen the well-deserved confidence of the local public in their native tribunals; but if, despite this ever-present desire, the Board, after careful examination of the evidence, comes to the conclusion that the verdict of the jury cannot be sustained, no course is open to it but to set that verdict aside. Any other course would amount to a judicial wrong, the punishment of a litigant for something for which he has not been proved to be answerable.

Now, since the respondent again and again admitted that he

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knew that in going in between freight cars while in motion to uncouple them he endangered both his life and limbs, it could not be contended that he did not know and appreciate the risk he ran. He was acquainted with the place, knew where the switches were and knew they were open, since he himself had opened them. If the darkness increased the risk, he must have been aware of that fact also. Accordingly the respondent's counsel was driven to contend that, though his client knew well the nature and character of the risk he would run if he should act as he has done, he did not encounter that risk voluntarily, but, on the contrary, encountered it under the compulsion of a legal contractual obligation. Basing himself upon the supposed likeness of the case of *Sword* v. *Cameron* (1), discussed at length by Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (2), he argued, borrowing Lord Cranworth's language, that a negligent and defective system of carrying on the operation of shunting was allowed to grow up upon the appellant railway, according to which brakesmen were only required to operate uncoupling levers from outside the waggons so long as the coupling machines worked satisfactorily, but were not only permitted but were bound by the terms of their hiring to get in between cars when in motion for the purpose of uncoupling them whenever the pin happened to stick or the coupler did not work satisfactorily—that is that the brakesmen, including the respondent, were employed to discharge their duties as such according to this defective and negligent practice which was so permitted to prevail.

This, he admitted, was the way most favourable to him in which the contention could be put. It will be considered presently how far the principle of *Sword* v. *Cameron* (1) is applicable to the present case. Before proceeding further, however, it would be convenient to deal with the respondent's point as to the alleged defectiveness of the Tower coupler. [After a consideration of the evidence as to the Tower coupler the judgment proceeded :] Their Lordships are clearly of opinion that the evidence does not establish that the Tower coupler is a defective machine, or that the company failed in any way in their duty to their brakes-

(1) 1 S. S. C. (2nd ser.) 493. (2) 3 Macq. 266.

men to provide them with machines reasonably fit and proper for the work those brakesmen had to do. The learned judge who presided at the trial was apparently of the same opinion.

It remains to deal with the evidence bearing on the main question in the case. [Their Lordships' judgment dealt with the evidence in detail and proceeded:] The evidence of all of the respondent's witnesses shows conclusively that the rule prohibiting men from going in between cars in motion was perfectly well known. The necessity of observing it was impressed upon brakesmen, and they were fully aware of the dangers attending the transgression of it. He must be bound by evidence given on his behalf. Now the argument advanced by the respondent's counsel places him in this difficulty. If the respondent contracted to serve according to the defective system alleged to have been pursued, with or without light, he has no more right to recover for injuries arising from dangers inherent in that system than would a sailor, to take Lord Halsbury's illustration, be entitled to recover damages because he fell from the rigging when, in obedience to orders, he went aloft, or a jockey who was retained to ride in a steeplechase be entitled to recover damages because in the race he was thrown and injured, while if the defective system merely applied to acts done in the daylight or with clear and adequate artificial light, the respondent, knowing the dangers, as he admittedly did, was all the more rash and reckless in going in between the trucks at night. The case of *Sword* v. *Cameron* (1) was a very peculiar one and, in their Lordships' view, bears no resemblance whatever to the present. There is no proof whatever in this case that this practice of going in between moving cars was ever tolerated or approved of by the company, or the infraction of the rule against it systematically winked at by the company or its officers, and still less proof that the respondent was hired to act under any circumstances in violation of the rule.

It was proved that the brakesmen, though directed to observe the rule, violated it occasionally at their own risk. A company such as this are not required to have every rule for the guidance of their staff printed or reduced to writing. If their employees

(1) 1 S. S. C. (2nd ser.) 493.

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are aware of the existence and terms of the rule, they are bound by it whether it be written or not. Negligence is a breach of duty, and their Lordships are quite unable to discover what is the particular duty owed by the appellant company to the respondent which the company has violated. They supplied their brakesmen with machines reasonably effective for the purposes required. They caused their staff to be informed that certain rules should be observed. The fact that their employees violated these rules cannot enlarge the duties the company owed their staff, or impose new duties towards that staff upon them. The respondent has suffered very serious injuries, and is entitled to one's deepest sympathy; but on the whole case their Lordships are clearly of opinion that he is the unfortunate victim of his own rashness and recklessness, and that consequently he has no legal claim against the appellant company since they have done him no legal wrong. With moral claims, if any, this Board has no concern. They further think that the answer to question No. 3 is not such as a jury could, on the evidence, have reasonably found. This appeal should therefore be allowed, the judgment appealed from overruled, the verdict found by the jury set aside, and a verdict entered for the appellants. They will humbly advise His Majesty accordingly.

The respondent must pay the costs here and below.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondent: *Lawrence Jones & Co.*

[HOUSE OF LORDS.]

WATNEY, COMBE, REID AND COMPANY, LIMITED . . . . . } APPELLANTS;

AND

BERNERS . . . . . RESPONDENT.

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Revenue—Licensed Premises—Increase of Duty—"Held under a lease"—Right of Lessee to recover Proportion of Increase of Duty from Lessor—Mesne Lessee—Licence Holder—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 43, 46—*Finance Act*, 1912 (2 *& 3 Geo.* 5, *c.* 8), *s.* 2.

Sect. 2 of the Finance Act, 1912, provides that "where the licensed premises are held under a lease" made before the passing of the Finance (1909-10) Act, 1910, which does not contain any covenant by the lessee to obtain a supply of intoxicating liquor from the grantor of the lease, the lessee shall be entitled to recover from the grantor a proportion of any increase of the duty payable in respect of the licence under the Finance (1909-10) Act, 1910:—

Held, that the provision applies to the case of a lessee of licensed premises who has sub-let the premises and who is not himself the holder of the licence.

Decision of the Court of Appeal [1914] 3 K. B. 288 reversed.

APPEAL from an order of the Court of Appeal (1) affirming an order of the Divisional Court which reversed a judgment of the judge of the Bloomsbury County Court.

The action was brought by the appellants against the respondent under s. 2 of the Finance Act, 1912 (2), to recover a

* *Present:* VISCOUNT HALDANE L.C., EARL LOREBURN, LORD STRATHCLYDE, LORD PARMOOR, and LORD WRENBURY.

(1) [1914] 3 K. B. 288.

(2) Finance Act, 1912, s. 2: "Where the licensed premises are held under a lease or agreement for lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease or agreement for lease to obtain a supply of intoxicating liquor from the grantor of the lease or agreement for lease, the lessee under such lease or agreement for lease shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, the grantor of such lease or agreement for lease so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as

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proportion of the increase of the licence duty charged in respect of certain licensed premises known as the City of Hereford public-house, being No. 37, Cleveland Street, in the parish of St. Marylebone in the county of London.

The facts were as follows: The appellants were the lessees of the public-house under a lease dated May 4, 1905, of which the respondent, the freeholder, was the grantor. The lease was for twenty-one years from Midsummer, 1906, at a yearly rental of 150*l.*, and did not contain or import any covenant, agreement, or undertaking on the part of the lessees to obtain a supply of intoxicating liquor from the grantor. The premises were sub-let by the appellants to W. E. Saile, who was the licensee and occupier of the premises, by an agreement dated January 4, 1911, for a period of one year from January 10, 1911, and so on from year to year at a rent of 156*l.* per annum. By the terms of this agreement Saile agreed to purchase from the appellants or their nominees, and from no other person or persons whomsoever, all beer, porter, stout, and other malt liquor, whether in bottle or otherwise, and all wines, spirits, and spirituous liquors and liqueurs that should be sold and consumed in, upon, or from the premises, and the appellants agreed with Saile to pay the licence duty payable by him in respect of the premises. The appellants had in fact paid such licence duty. The duty payable in respect of the premises prior to the Finance (1909-10) Act, 1910, was 30*l.* The duty was now 64*l.*—an increase of 34*l.* The estimated annual value of the premises unlicensed was agreed as follows: At the date of the grant of the lease, 87*l.*; at the date of the grant of the sub-lease, 88*l.*; at the date of the coming into force of the Finance Act, 1912, 89*l.*; at the date of the commencement of the present proceedings, 90*l.*; and the difference between these sums of 87*l.*, 88*l.*, 89*l.*, and 90*l.* respec-

proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by rules of court by a county court in England or Ireland, and by a sheriff court in Scotland.

"The words 'lease,' 'leased,' 'agreement for lease,' and 'lessee' in this section include sub-lease, sub-leased, agreement for sub-lease, and sub-lessee, respectively."

tively and the rent of 150*l.* represented at the respective times the increased rent payable in respect of the premises being let as licensed premises.

The county court judge held that the appellants held the licensed premises under a lease within the meaning of s. 2 of the Finance Act, 1912, and in estimating the sum to be recovered he held that the annual value of the premises should be taken as at the date of the grant of the lease (namely, 87*l.*), and consequently that the increased rent attributable to the licence was 150*l.* less 87*l.* = 63*l.*; and on this footing he awarded the appellants the sum of 14*l.* 5*s.* 7*d.* as the amount of the increase of duty proportionate to the increased rent and ordered judgment to be entered for the appellants for that sum.

The Divisional Court (Ridley and Lord Coleridge JJ.) reversed the judgment of the county court judge and ordered judgment to be entered for the respondent upon the ground that s. 2 of the Finance Act, 1912, did not apply to the case of a lessee of licensed premises who had sub-let them and also was not himself the holder of the licence, and the decision of the Divisional Court was affirmed by the Court of Appeal by a majority (Kennedy L.J. and Bray J., Lord Sumner dissenting).

1915. April 15, 16. *Sir Robert Finlay, K.C.*, and *Ryde, K.C.* (with them *Wootten*), for the appellants. The appellants are within the very words of the section. They hold the licensed premises as lessees under a lease made before the passing of the Finance (1909-10) Act, 1910, of which the respondent is the grantor, and which does not contain any covenant, agreement, or undertaking on the part of the lessees to obtain a supply of intoxicating liquor from the grantor. There is nothing in the language of the section limiting it to the case of a lessee who is also the licence holder. That language must be construed according to its natural meaning. It is not admissible to speculate upon the motives of those who framed the legislation except so far as they appear from the language of the statute: *Inland Revenue Commissioners* v. *Herbert.*(1) The intention of the Legislature was that all persons interested in the licensed

(1) [1913] A. C. 326, at p. 332.

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premises should share the burden of the increase of duty. [They also referred to *Rex* v. *Shoreditch Assessment Committee, Ex parte Morgan.* (1)]

P. O. Lawrence, K.C., and *Lord Tiverton* (with them *H. E. Duke, K.C.*), for the respondent. Sect. 2 of the Finance Act, 1912, was enacted to remedy a casus omissus in the Finance (1909-10) Act, 1910, and must be read in connection with that Act. By s. 43 of the Act of 1910 and Sched. I., par. C, an increased duty is imposed on the retailer of intoxicating liquors, and s. 46 grants a partial relief in respect of such increase of duty to the licence holder (i.e., the retailer), whether he be a freeholder or a leaseholder, who is under covenant to take his liquor from another, but it grants no relief to a licence holder who is not under a tie. Sect. 2 of the Act of 1912, like s. 46 of the Act of 1910, is intended for the relief of the licence holder. It deals with the case of a licence holder, being a lessee, who is not under a tie to his landlord, and that is the whole scope of the section. The lessee, as defined by the section, is one particular person holding under one particular document, whether it be a lease or agreement for a lease or a sub-lease or agreement for a sub-lease. The section refers to one person only as entitled to recover a portion of the increased duty, namely, the retailer who is liable to pay the duty, and operates simply between the licence holder and his immediate lessor. It does not contemplate a succession of claims for relief until the matter is brought home to the ultimate lessor, the freeholder, and it makes no provision, as it might have done if the Legislature had thought fit to do so, for the distribution of the burden amongst all the owners. The section uses the term "the licensed premises," but the term is not used elsewhere in the Act, and to explain the use of the definite article one must have recourse to s. 46 of the Act of 1910. Looking at that section the term means the licensed premises in the hands of the licence holder. Apart from the use of the definite article, the term "licensed premises" assists the respondent's argument. Strictly speaking premises are not licensed, but the meaning of the term as defined by the Licensing (Consolidation) Act, 1910, is premises in respect of which some person has

(1) [1910] 2 K. B. 859.

obtained a licence to sell liquor. That connotes premises in the hands of the licence holder. This argument is strengthened by the fact that the subsequent words of the section contemplate that the lessee is a person who requires a supply of liquor. The section says that the lessee is to recover a portion "of any increase of the duty payable" &c. That means that the money is to be recovered by the person who has had to pay the duty under s. 43 of the Act of 1910. "Payable" means payable by him. Upon the appellants' construction an intermediate lessee, who may not have had to pay any part of the duty, would be able to tax the freeholder, but the more reasonable construction is that the section was intended to relieve the taxpayer and was not intended to enable one subject to tax another for his own benefit.

The House took time for consideration.

May 18. VISCOUNT HALDANE L.C. My Lords, my noble and learned friend Lord Loreburn desires me to say that he concurs in the judgments which are about to be delivered.

The question to be decided is whether the appellants are entitled to recover from the respondent 14*l.* 5*s.* 7*d.*, being part of the increased licence duty payable under the Finance Acts, 1910 and 1912. The appellants hold the City of Hereford public-house under a lease granted by the respondent on May 4, 1905. The rent is 150*l.*, and the lease does not contain or import any covenant, agreement, or undertaking on the part of the lessees to obtain liquor from the lessor. The public-house was, by an agreement dated January 4, 1911, sub-let by the appellants to one Saile at a slightly increased rent. Saile agreed to purchase the liquor he required for his business as a publican from the appellants, so that the house which in their hands was free became as between them and him a tied house. Saile holds the licence. The duty payable by the licensee was, prior to the Finance Act of 1910, 30*l.* It is now 64*l.*

Under s. 46 of the Act of 1910, Saile, being bound by the tie to the appellants as to supply of liquor, could recover from them so much of the increase of his licence duty as was proportionate

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to the increased rent of the licensed premises, or the increased prices of intoxicating liquor supplied, or any other benefit obtained by them from the tie. No question arises as to the appellants' liability under that section to their sub-tenant, Saile.

The question which does arise is whether the appellants are entitled to the benefit of s. 2 of the Act of 1912. [His Lordship read the section.]

My Lords, the appellants are not in occupation, and are not the holders of the licence, but have only sub-let to Saile, the holder, who is in occupation. The point in dispute is whether the section applies to a lessee who is in what is thus the position of the appellants. No controversy is raised in this appeal as to figures or the basis on which they have been calculated. Nor have we to decide a question which may arise hereafter as to the scope and meaning of the expression "grantor." The appeal is confined exclusively to the point which I have stated.

My Lords, if the literal reading of the words is to prevail, it appears to me plain that the appellants can successfully claim to come within the words which Parliament has used. The premises are licensed premises, and they are held under a lease made prior to the Finance Act, 1910. Unless a sufficient reason can be found for implying in the early part of the section words which will make it read "are held by a person being a licence holder," or for implying further on such words as "by him" in the reference to an increase of duty payable in respect of the licence, it does not appear that there is any ground for regarding the case as outside the provision which Parliament has made.

Now there is nothing in the context in the section taken by itself which warrants the reading in of these or any other words which would have the like effect. But it has been held by the majority in the Court of Appeal that when the scheme of the Act of 1910 is looked at, that scheme shows that s. 2 of the Act of 1912 ought to be read as referring only to a lessee who is himself the licence holder. Kennedy L.J. referred to the circumstance that the increase of duty was imposed by the new legislation on the licence holder. He thought himself at liberty to infer from this circumstance that Parliament could

not have meant to give to a lessee a pecuniary benefit by enabling him to make a deduction from rent due to his lessor in a case where he neither bore the new burden himself in the capacity of licence holder, nor was subjected to a deduction from the rent payable to him by a sub-lessee being the licence holder.

My Lords, I am of opinion that the Courts below have gone further than is legitimate in conjecturing what Parliament intended. The intention must be found in the language finally adopted in the statutes under construction, and in that language alone. No doubt general words may in certain cases properly be interpreted as having a meaning or scope other than the literal or usual meaning. They may be so interpreted where the scheme appearing from the language of the Legislature, read in its entirety, points to consistency as requiring the modification of what would be the meaning apart from any context, or apart from the purpose of the legislation as appearing from the words which the Legislature has used, or apart from the general law. In the statutes before us Parliament has thought fit, in the first place, by s. 46 of the Act of 1910, to enable the licence holder of a house in respect of which a tie exists to claim over for a deduction against the person entitled to the benefit of the tie.

It is obvious that the person so entitled may not be the lessor. It is common knowledge that in many instances he is a different person. Later on, by s. 2 of the Act of 1912, Parliament thought fit, in another class of case in which there was no tie, to confer a right of a distinct character on the lessee. It is said truly that in cases where the lessee is not himself subjected to any deduction by being a person entitled to the benefit of a tie by which a licence holder to whom he has sub-let is bound, he will, if s. 2 receives its literal interpretation, be at liberty to claim in reduction of his rent, and put into his own pocket a sum equal to a proportion of the new duty. That may be so. But apparently all that Parliament, in the section under construction, had in mind was to make the lessor of licensed premises, in cases where there was no tie, give up, out of so much of his rent as arose from the premises being licensed, an amount proportionate to the new burden of increased duty. That appears to have been all that the Legislature thought of at the moment,

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and it did not in terms restrict the cession to cession by way of indemnity.

In cases where, as in the present one, there is a tie of which he has the benefit, the lessee himself has to bear a share of the burden, which may be greater or less than the amount which he can claim over against his own landlord. In other cases where there is no such tie, the licence holder who is lessee can claim against his immediate lessor in respect of the proportion of duty due to the premises being let as licensed. The immediate lessor can, according to the natural meaning of the words of s. 2, claim over against any freeholder or intermediate lessee who has demised to him. Such a person, if himself a lessee, will have a claim over in his turn against his landlord. But in order to give rise to such rights the lease must be a lease of licensed premises, and there must be an increase of rent or premium in respect of the premises being let as licensed. It may be that Parliament thought that these conditions sufficiently protected lessors in leases made prior to the Finance Act, 1910, the only leases to which the section applies. If the principle be that where there is a tie s. 46 of the Act of 1910 is to regulate the right of deduction, but that where there is no tie a landlord, who receives an increase of rent or premium payable by reason of the premises being licensed, is to return out of such increase a proportionate part of the increased duty, this principle is at least intelligible. Whether the draftsman has succeeded in sufficiently guarding, in all possible circumstances, against the words of the section extending to cases which are really outside the principle is a question which does not arise in the present litigation.

It is true that in some instances the intermediate lessor will, if the appellants' contention is correct, bear no share of the new toll taken by the State, and may, notwithstanding, obtain what is equivalent to a reduction of rent. This is possible, because the ground covered by s. 2 of the Act of 1912 is different from that to which s. 46 of the Act of 1910 applies. Parliament has thought fit so to enact. It has secured the interest of the State, and then said that the head landlord is, as between himself and the intermediate landlord, not only to relieve the latter of any

burden, but in certain cases to give him a sum by way of reduction in respect of a burden which he has not had to bear, a sum which is, therefore, sheer profit to him. It may seem odd that a general principle which in a large number of cases works out quite naturally in making the head landlord relieve his tenant of what the latter has, directly or indirectly, to pay to the State should have been left to operate in instances where the tenant has to bear no burden. Possibly Parliament did not think of such a contingency. Possibly it did think of it, but considered it best to subject the head landlord in all cases to the new deduction.

The language of the statute throws no light on the matter, and this being so, the duty of the Court is simply to interpret the words used in accordance with their natural signification. According to their natural signification they neither are of doubtful import, nor are confined only to affording relief, as distinguished from enabling a benefit to be obtained, nor are restricted to cases in which the licensed premises are held by a tenant who is himself the licence holder. Whether Parliament may hereafter think fit to reconsider certain of the consequences which result from the general application of the principle which it has adopted is a question for Parliament alone. It is not a question which your Lordships can take into consideration in construing words which do not appear to be ambiguous either in themselves or by reason of the basic principle of the legislation in which they occur.

I am, therefore, of opinion that the appeal ought to succeed, with costs here and in the Courts below, and that the judgment of the county court judge ought to be restored. I move accordingly.

LORD STRATHCLYDE. (1) My Lords, at the outset of his opinion, Kennedy L.J. observes that the difficulty in this case arises from the ambiguity of the statutory enactment upon the interpretation of which the case depends—the Finance Act, 1912, s. 2.

I have been unable to discover any ambiguity in the statutory

(1) Read by Lord Parmoor.

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enactment referred to when I put upon the language used its obvious and ordinary meaning. That language, it is not disputed, exactly fits the case before us. I can therefore conceive no good reason why we should hold it to be inapplicable. It is inapplicable only if we assume that the enactment has a limited object. But I am not entitled to assume that, and I decline to do so. To the crucial question—does s. 2 apply to lessees other than licence holders—I give an unhesitating answer in the affirmative. To the equally crucial question—does s. 2 apply only to licence holders—I give an equally unhesitating answer in the negative. My reason for both answers is because the statute in very plain language says so. In the reasoning of Lord Sumner I desire to express my entire concurrence. I cannot add to it. I certainly cannot improve upon it.

Of the magnitude and character of the consequences which, it is said, will follow from the interpretation we place upon this statutory enactment I do not feel that I am competent to judge. But I am satisfied that we ought not to misconstrue the statute even although we may think that the result of our interpretation may not have been within the contemplation of its framers. I therefore agree that the judgment of the county court judge ought to be restored.

Lord Parmoor. My Lords, the appellants hold, under a lease from the respondent, certain licensed premises, the City of Hereford, for a term of twenty-one years from Midsummer, 1906, at the yearly rent of 150*l*. The lease does not contain or import any covenant or agreement or undertaking on the part of the appellants to obtain a supply of intoxicating liquor from the respondent.

The premises comprised in the lease were let by the appellants to William Emile Saile, under an agreement dated January 4, 1911, for a period of one year from January 10, 1911, and so on from year to year, at a yearly rent of 156*l*. Under this agreement Saile agreed to purchase of the appellants or their nominees, and of no other person or persons whomsoever, all ale, beer, porter, stout, and other malt liquor, whether in bottle or otherwise, and all wines, spirits, and spirituous liquor or

liqueurs, that should be sold and consumed in, upon, or from the said premises. To use ordinary language there was no tie in the lease from the respondent to the appellants, but there was a tie in the agreement from the appellants to Saile. In the agreement with Saile the appellants undertook to pay the licence duty payable for the licence held by Saile in respect of the said premises.

The duty payable in respect of the licence of the City of Hereford prior to the Finance (1909-10) Act, 1910, was 30*l.*, but under the provisions of that Act it is 64*l.* The question in the appeal is whether the appellants under s. 2 of the Finance Act, 1912, are entitled to recover from the respondent a sum which for the purpose of this case has been agreed at 14*l.* 5*s.* 7*d.* I understand that in a subsequent case the question whether the sum to be recovered has been properly ascertained may come up for decision, and desire to make it quite clear that I express no opinion on this point.

It is not necessary to set out the terms of s. 2 of the Finance Act, 1912. It is not denied that in form the section would include a mesne lessee such as the appellants, if the lease does not contain or import any covenant, agreement, or undertaking on the part of the lessee under the lease to obtain a supply of intoxicating liquor from the grantor of the lease. The respondent, however, contends that the language of the section is applicable only to a lessee holding a licence, on the ground that he is the only lessee upon whom the burden of an increased duty has been placed by the Act of 1910, and that, unless this limitation is applied, the mesne lessee may in some cases obtain an unfair advantage in the distribution of the charge which the increment duty imposes. My Lords, I agree in a statement made by Kennedy L.J. in his judgment that "the consideration of consequences is an unsafe interpreter of a statutory enactment." There is no case in which it is more important to remember this caution than in the interpretation of a section in a taxing Act, expressed in general terms, applicable to a large number of varying business arrangements. The Court has seldom sufficient information to know accurately to what extent the suggested anomalies occur in practice or what weight should be attached

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Lord Parmoor.

to selected instances. I desire to make no pronouncement under this head in the present case, but it may well be that the class of instances to which Mr. Lawrence referred are not more than a small percentage of the whole number which come within the section.

The construction of s. 2 of the Finance Act, 1912, presents no special difficulty either in the language used or in reference to the general object of the section. The section, no doubt, is limited to a lease, or agreement for lease, made before the passing of the Act of 1910, in which there is no tie. The increase of duty payable in respect of the licence under the provisions of the Act of 1910 is imposed directly on the licence holder, and the object of the section is to transfer to the grantor of a lease, who is receiving an increased rent or premium in respect of the premises being let as licensed premises, so much of such increased duty as is proportionate to such increased rent or premiums. In the present case the annual value of the premises unlicensed has been agreed, and the difference between such annual value and the actual rental of the premises as licensed is 63*l*. The sum which the appellants seek to recover from the respondent is 14*l*. 5*s*. 7*d*., less than one-quarter of the enhanced rental which the respondent receives in respect of the premises being let as licensed premises. It is immaterial that in this case the appellants agree to pay the licence duty payable in respect of the licence held by Saile, but the result is that it cannot be alleged against the present appellants that they are receiving any undue advantage to the detriment of the respondent. I do not doubt that in other cases some different form of agreement might be made affecting the proportionate distribution of burden between the liquor seller and the licence holder under s. 46 of the Act of 1910. In the event of no agreement being made, the amount would be determined by the Commissioners under that section.

The argument of Mr. Lawrence on behalf of the respondent that the section should be construed so as to limit its application to a lessee who is also a licence holder was summarized by him under three heads. In the first place he argued that the words " the licensed premises " implied premises occupied by the

licence holder. I am unable to find any such limitation implied in the language used. The succeeding words "held under a lease or agreement for lease" introduce a test of tenure only, and apply just as fully to a mesne lessee as to a licence holder. In the second place, Mr. Lawrence argued that the limitation of the section to free houses imported that the lessee was a person who would require to purchase intoxicants, though not bound to take them from the grantor of the lease. The same answer applies as before, that the language of the section defines the character of the lease to which the section is applicable, and includes a lease to a mesne lessee whether he happens to be a brewer or some other person who has no interest in the trade, and relets the premises to a free tenant. In the third place Mr. Lawrence argued that the words in the section "so much of an increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910," should be read as though the words "by him" had been inserted after the word "payable."

If this is the right construction the section would be limited to a lessee who is also a licence holder, because the licence holder is the only lessee by whom the increase of duty is payable under the Act. I am unable to understand on what principle it is permissible to construe the section as though words had been inserted which alter in a material way its scope and ambit. In my opinion the words "increase of the duty payable in respect of the licence under the Act, 1910," are introduced for the purpose of fixing the amount of one of the data by which the amount recoverable under the section is directed to be ascertained. For this purpose it is not material by whom the charge is payable under the Act, and no implication arises that a mesne lessee who is not a licence holder is not within the section.

My Lords, during the course of the argument frequent reference was made to s. 46 of the Finance Act, 1910. This section applies only to a case where the licence holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind to obtain a supply of intoxicating liquor from some person or persons, and depends on

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considerations which find no place in the construction of s. 2 of the Act of 1912.

My Lords, in my opinion the appellants are entitled to succeed, and I concur in the motion to be proposed by the noble Viscount on the woolsack.

LORD WRENBURY. My Lords, in the year 1910 the Legislature imposed an increase of duty in respect of the licence upon licensed houses, and, by s. 46 of the Act which imposed it, dealt with the incidence in certain cases of the new duty. The section is very limited in its scope. It is confined to tied houses. It speaks only as between the licence holder, who is subject to the tie, and the person to whom he is tied, who may or may not be his lessor. Its purpose is obviously to apportion the increased duty between those two persons in such proportion to the benefit which they derive from the business as is indicated by the section.

It is obvious that the above enactment failed to make provision for several matters. For instance, as regards the licensed houses themselves, the free house was not dealt with, and as regards the persons interested in the licensed premises, the lessor, as such, was not dealt with. He only fell within s. 46 if the house was tied, and if he was the person to whom it was tied.

In 1912 the Legislature took these further matters, or some of them, in hand, and s. 2 of the Act of 1912 was passed. That section is limited in point of time. It operates only upon contracts existent before the Act of 1910. It speaks as between persons different from those as between whom s. 46 of the Act of 1910 spoke. It speaks as between lessor and lessee. It is confined to free houses. The reason for this last is not obvious, but for the present purpose it is not necessary to seek it. The section does not discriminate the case in which the house is free for certain liquors, say wine and spirits, and is tied, say, as regards ale and stout, from the case in which the house is wholly tied or wholly free. It operates only where the house is wholly free. The purpose of the section in the case in which it becomes operative seems to me reasonably plain. It is as follows: An owner may, before the Act of 1910,

—before, that is, the additional duty was imposed—have let the premises at a rent which would, of course, have been arrived at upon the footing that that additional duty did not exist. To take the figures in the present case, he may have let at a rent of 150*l.*, being 86*l.* for the annual value of the bricks and mortar and 64*l.* for the annual value of the licence—the annual value, that is, of the right to carry on upon the premises the trade of a licensed victualler. When the additional duty was imposed the latter annual value was pro tanto diminished, and it might be, and the Legislature presumably thought that it was, fair that the lessor should take for the future, not the 64*l.* a year clear, but should bear such proportion of the additional duty as is indicated by the section, because if he had contracted after the Act he would not have been able to get so much as the 64*l.* annually which he in fact obtained before the Act.

My Lords, it results, in my judgment, from what I have said, that s. 46 of the Act of 1910 and s. 2 of the Act of 1912 are dealing with different subject-matters under different circumstances and as between different persons. Under these circumstances I decline to draw any inference from a comparison of the wording of the two sections. I have but to read s. 2 of the Act of 1912 to ascertain its meaning and give effect to it.

The lease with which I have to do was granted before the Act of 1910. It does not contain a tie. Sect. 2 therefore is applicable. It is irrelevant that a sub-lease was granted after the Act which does contain a tie. The original lessee could, of course, create by sub-demise such contractual relations as he chose, being not inconsistent with his title under the head lease. The rights and obligations of the head lessor could not be in any way thereby affected. Under these circumstances the language of s. 2 seems to me plainly to create in the defendant in this action as grantor of the lease a statutory debt to his lessee to be ascertained in manner provided by this section. For the decision of this case it is not necessary to say more. That there are other points of difficulty which arise upon the section is obvious. Your Lordships may have to deal with such hereafter. They do not arise at present and I say nothing about them.

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My Lords, for the reasons which I have assigned, I agree that the appellants in this case are entitled to succeed.

Order of the Court of Appeal reversed and judgment of the county court judge restored. Respondent to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, May 18, 1915.

Solicitors for appellants: *Godden, Holme & Ward.*
Solicitors for respondent: *Saxton & Morgan.*

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EASTWOOD . . . . . APPELLANT;

AND

ASHTON . . . . . RESPONDENT.

Vendor and Purchaser—Conveyance—Parcels—Plan—Falsa demonstratio—Implied Covenants for Title—Breach—Omission to prevent Acquisition of Title under Statute of Limitations—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (*A.*).

In 1911 the vendor as beneficial owner conveyed to the purchaser a farm called Bank Hey Farm containing 84 a. 3 r. 4 p. or thereabouts and in the occupation as to part thereof of H. as yearly tenant thereof and as to the remainder thereof of C. as half-yearly tenant thereof, all which said premises were more particularly described in the plan indorsed on the conveyance and coloured red. The plan included a small strip of land some 150 ft. long by 36 ft. wide which had formerly formed part of Bank Hey Farm, but as to which at the date of the conveyance an adverse title under the Statute of Limitations had been acquired by the adjoining owners and which was occupied by them or their tenants. At the date of the conveyance only the land occupied by H. was known as Bank Hey Farm, and part of the land described as in the occupation of C. was sub-let by him. The acreage was not an exact measurement:—

Held, (1.) that the description by reference to the plan ought to

* *Present:* EARL LOREBURN, LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

prevail and that the strip of land was included in the conveyance; (2.) that the omission of the vendor to prevent the acquisition of an adverse title to the strip of land under the Statute of Limitations constituted a breach of the implied covenant for the right to convey under s. 7, sub-s. 1 (A.), of the Conveyancing and Law of Property Act, 1881.

Decision of the Court of Appeal [1914] 1 Ch. 68 reversed and decision of Sargant J. [1913] 2 Ch. 39 restored.

APPEAL from a decision of the Court of Appeal (1) reversing a judgment of Sargant J. (2)

The substantial question raised by this appeal was whether an indenture of conveyance dated June 28, 1911, whereby the respondent as beneficial owner conveyed to the appellant certain lands in the parish of Blackburn in Lancashire, included a small strip of land to which the respondent had lost his title by virtue of the operation of the Statute of Limitations. This strip of land (hereinafter called the disputed strip) was about 36 feet wide and 150 feet long and contained about 605 square yards.

On May 4, 1911, the respondent offered for sale by public auction, subject to certain printed particulars and conditions of sale, considerable estates at Blackburn and Clitheroe which he had become possessed of or entitled to under the will of one William Thomas Carr, who died on December 14, 1883. At this sale one Albert Ball became the purchaser of Lot 4 at the price of 4700*l.*

Lot 4 was described in the particulars as "Bank Hey Farm" and as being coloured pink on the plan No. 1 attached to such particulars and as estimated to contain 84 acres 3 roods and 4 poles. The particulars also stated that the said lot was a valuable dairy holding occupying an important position with considerable frontages to Bank Hey Lane and new roads adjacent to Whalley New Road and that from its situation it would give a purchaser an easy opportunity for development, and it was stated that part thereof was in the occupation of Mr. Thomas Haydock and part in the occupation of Mr. Charles William Cartman.

The area coloured pink on plan No. 1 attached to the particulars was an area or several areas of land of a highly irregular shape and included the disputed strip, which was shown as

(1) [1914] 1 Ch. 68. (2) [1913] 2 Ch. 39.

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abutting to the north on Clarendon Road (which was one of the "new roads adjacent to Whalley New Road"), to the west on the embankment of a line of railway of the Lancashire and Yorkshire Railway Company, and to the east on some houses coloured blue on the plan which were described thereon as Lot 12A.

By a note printed on the plan it was stated that the plan was reproduced from the Ordnance Survey and was intended only for the purpose of indicating the position of the property and that it was not to be deemed to form part of the contract.

By condition 14 of the conditions of sale "any incorrect statement error or omission found in the particulars or conditions is not to annul the sale or entitle any purchaser to be discharged from his purchase nor is the vendor or any purchaser to claim or be allowed any compensation in respect thereof."

Shortly after the sale and before completion of his purchase Ball resold the property comprised in Lot 4 to the appellant at the price of 5000*l.* and the property was duly conveyed to the appellant by the indenture next hereinafter stated.

By the said indenture dated June 28, 1911, and made between the respondent of the first part, Albert Ball of the second part, and the appellant of the third part, after reciting (amongst other things) that the hereditaments intended to be thereby assured (together with other hereditaments) described as Lot 4 were put up for sale by public auction on May 4, 1911, by the direction of the respondent, and that at such sale the said Albert Ball was declared the purchaser of the same, it was witnessed that in consideration of 4700*l.* to the respondent and the sum of 300*l.* to the said Albert Ball paid by the appellant the respondent as beneficial owner, at the request of the said Albert Ball, thereby conveyed, and the said Albert Ball as beneficial owner thereby conveyed and confirmed, unto the appellant "all that farm with the messuage tenement or farmhouse barns stables outhouses closes or parcels of land belonging thereto called 'Bank Hey Farm' situate in the parish of Blackburn in the county of Lancaster containing 84 acres 3 roods and 4 perches or thereabouts and in the occupation as to part thereof of Thomas Haydock as yearly tenant thereof and as to the remainder thereof of Charles William Cartman as half-yearly tenant thereof all of which said

premises are more particularly described in the plan endorsed on these presents and are delineated and coloured red in such plan," excepting and reserving thereout all mines and minerals, to hold the same unto and to the use of the appellant in fee simple.

On March 11, 1912, the appellant agreed to sell to Messrs. Shaw & Ainsworth, millowners, a portion of Lot 4 for the purpose of the erection thereon of a mill. The land so agreed to be sold included the disputed strip, which was intended to be used for the purposes of access to the mill site from Clarendon Road, and which was the natural means of access thereto. When the land came to be surveyed it was discovered that the disputed strip of land was divided longitudinally from north to south by a railway sleeper fence and was in fact as to the western part in the adverse occupation of the Blackburn Corporation as tenants of the Lancashire and Yorkshire Railway Company and as to the eastern part in the adverse occupation of the persons entitled to a lease dated October 13, 1882, whereby W. T. Carr (from whom the respondent derived his title) demised to George Chadwick for 999 years the land lying to the east of the disputed strip, and it was then admitted by the respondent that at the date of the conveyance of June 28, 1911, he had no title to the disputed strip. The facts as to the title of this piece of land are fully stated in the report of the case before Sargant J. The appellant thereupon made further arrangements with the millowners under which he provided them with access to the mill site from Clarendon Road a little further to the east. For this purpose he purchased Lot 12A and resold so much of the lot as was not required for the new access, and these transactions (as the respondent admitted) resulted in a loss to him of 315*l.* 16*s.* 8*d.*

On May 8, 1912, the appellant commenced an action for damages against the respondent for breach by him of the covenants for title implied by virtue of his having purported to convey the disputed strip as beneficial owner. The respondent by his amended defence denied the breach of covenant and alleged that the disputed strip had been included in the plan by mistake and that on the true construction of the conveyance it was never conveyed to the appellant. In the alternative he

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pleaded condition 14 of the conditions of sale as an answer to the action.

At the trial of the action the evidence established that at one time the whole of the land conveyed to the appellant, including the disputed strip, had been known as Bank Hey Farm, but that at the date of the conveyance only that part of the land which was in the occupation of Haydock was called by that name; also that part of the land described as in the occupation of Cartman had been sub-let by him to various persons for hen runs. As regards the acreage the respondent's surveyor stated that the true area of Lot 4 was 85 acres 3 roods and 5 poles, and that he arrived at this result by taking an average of several measurements which differed materially in extent, and he admitted that it was possible for the measurements of Lot 4 taken by two separate surveyors to differ by 500 square yards.

Sargant J. held (1.) that in the circumstances the description by plan ought to prevail; (2.) that the 14th condition of sale did not apply; (3.) that an adverse title under the Statute of Limitations had been acquired by the railway company and the owners of the Chadwick lease to the disputed strip, and that the failure of the respondent (or his predecessors in title) to prevent a trespasser from acquiring a title to the land by adverse possession constituted a breach of the covenant for title implied by the Conveyancing and Law of Property Act, 1881. He accordingly gave judgment for the appellant for 315*l.* 16*s.* 8*d.*

This judgment was reversed by the Court of Appeal (Cozens-Hardy M.R., Swinfen Eady and Phillimore L.JJ.) on the ground that upon the true construction of the conveyance the disputed strip was not expressed to be conveyed to the appellant. In their opinion the plan ought to be treated as a falsa demonstratio and rejected on the principle of *Llewellyn* v. *Earl of Jersey*. (1)

April 20, 22. *Romer, K.C.*, and *T. T. Methold*, for the appellant. The one certain description is the reference to the plan, and if any part of the description is to be rejected it is the reference to the occupation. The earlier cases give some support to the view, on which the Court of Appeal proceeded, that the

(1) (1843) 11 M. & W. 183.

false description must follow the true, but it is now settled that it is immaterial in what part of the description the falsa demonstratio is found: *Cowen* v. *Truefitt, Limited.* (1) It is begging the question to say that the plan is a falsa demonstratio. In the very case relied upon by the Court of Appeal, *Llewellyn* v. *Earl of Jersey* (2), the description which prevailed was the description by plan and that which was rejected was the description by acreage. In the present case the disputed strip is so small that no reliance can be placed on the reference to the acreage, which is admittedly not precise. To find out what was meant to be conveyed you must look at the whole document and at the surrounding circumstances. Condition 14 of the conditions of sale has no bearing on the question and does not relieve the vendor from his liability under the covenants for title in the conveyance. [They also referred to Sheppard's Touchstone, 7th ed. vol. ii., p. 247, and to *Page* v. *Midland Ry. Co.* (3)]

Alexander Grant, K.C., and *George B. Rashleigh*, for the respondent. 1. The rule as to falsa demonstratio means that where you find a clear and definite description in a document, whether it comes first or last in order, and then you find something which conflicts with the definiteness of that description, that is a nugatory addition. What was conveyed here was all the land in the occupation of Haydock and Cartman as tenants. If occupation in this context is, as in the circumstances it is submitted it ought to be, treated as equivalent to tenancy, that is a perfectly definite description. The identification of the property was in the tenancies. The land is also described by reference to the acreage, and it is proved that, excluding the disputed strip, the land measures the full acreage. There being then an adequate definition of the premises in the deed and no inconsistency in the language of the deed itself, the plan, which described something different, should be rejected as falsa demonstratio: *Dublin and Kingstown Ry. Co.* v. *Bradford.* (4)

[LORD PARKER OF WADDINGTON referred to *Rorke* v. *Errington.* (5)]

(1) [1899] 2 Ch. 309.
(2) 11 M. & W. 183.
(3) [1894] 1 Ch. 11.
(4) (1857) 7 I. C. L. R. 57.
(5) (1859) 7 H. L. C. 617.

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The respondent prays in aid the distinction between a conveyance by plan and a conveyance by description where a plan is added to assist the description.

2. Assuming that the reference to the plan is to prevail, the failure to eject a trespasser is not an omission within the meaning of the implied covenants for title in s. 7, sub-s. 1 (A.), of the Conveyancing Act, 1881. [Upon this point they referred to *Stanley* v. *Hayes* (1); *Cohen* v. *Tannar* (2); *Davis* v. *Town Properties Investment Corporation* (3); *Browning* v. *Wright*. (4)]

3. There is here no adequate evidence of damage.

The House took time for consideration.

June 10. EARL LOREBURN. My Lords, this House has to determine whether a small strip of land, about one-twelfth of an acre in size but important as a means of access to other land, passed from vendor to purchaser in a deed conveying some eighty-four acres. We must look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties.

The land to be conveyed is described in the deed as follows, omitting what is superfluous:—"All that farm . . . . called Bank Hey Farm . . . . containing 84 acres 3 roods and 4 perches or thereabouts and in the occupation as to part thereof of Thomas Haydock as yearly tenant thereof and as to the remainder thereof of Charles William Cartman as half-yearly tenant thereof, all which said premises are more particularly described in the plan endorsed on these presents and are delineated and coloured red in such plan."

That is all to which I need refer in this part of the deed.

Here are four guides towards identification of the land conveyed. The first is of no assistance, because there is no farm which is now known as Bank Hey Farm and can be made to fit this sale, though there used to be a farm of that name, now cut up into different parts. The second guide, namely, the acreage of 84 acres odd roods and perches, is of no value for our purpose

(1) (1842) 3 Q. B. 105.
(2) [1900] 2 Q. B. 609.
(3) [1903] 1 Ch. 797.
(4) (1799) 2 Bos. & P. 13, at p. 21.

because it is, by the contention of both sides, not an absolutely precise measurement, and it therefore cannot help us to a strip of land about one-twelfth of an acre in area. The third guide is very defective, because it is common ground that part of the land included in this sale was not in the occupation of either Haydock or Cartman, though all of it was tenanted by one or the other. A part of it was tenanted by Cartman but occupied by his sub-tenants. It is, however, the fact that the strip in question here was neither occupied nor tenanted by either of those gentlemen. I turn to the plan "endorsed on these presents," which is the fourth guide afforded by the conveyance, and I must observe that, though I have alluded separately to each of the four points of identification, all of them may have to be considered together, for each one may help us in understanding the others.

This plan, which I call the indorsed plan, shows an area of roughly eighty-four or eighty-five acres, divided into fields or plots, the whole of which is coloured red—pink, I should prefer to say. Beyond doubt the little strip in question is coloured red, and is not separated from, but appears as part of, a somewhat larger strip. The rest of the plan, except the roads, is not coloured at all, unless black and white are treated as colours. I see in this plan a perfectly definite delimitation of the land expressed to be conveyed in the deed.

Your Lordships were invited to scrutinize the language of the deed in regard to this indorsed plan and to hold that it did not purport to convey all that is coloured red, but merely to say that all which it purported to convey is coloured red. Upon this construction the plan would be useless for the purpose of ascertaining the area conveyed, and for that matter the whole parish might have appeared upon it in red colour. It would be also misleading, and I shall not assume that those who drew this conveyance intended to draw it so that such an argument should be available. I think they have prevented its being available. For when you say that the lands intended to be conveyed are more particularly "described in the plan," and that they "are delineated and coloured red in such plan," the draughtsmen surely meant to speak both of delineation and of colour. The strip is not only coloured red, but is also included

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in the same delineation with other land similarly coloured and admittedly included in the sale. The draughtsmen have nothing with which to reproach themselves. Were it otherwise I should use the particulars of sale and their relevant plan, which make it quite clear, upon the ground that they are referred to in the deed.

Sargant J. held that the strip in question was included in the conveyance. The Court of Appeal thought differently, and it has caused me much misgiving to find myself in difference with such very great authority upon such a point. But I feel bound to act on my own view. I cannot think that the description of the land in the letterpress was "certain, definite, satisfactorily ascertained property," as the Master of the Rolls expresses it. I observe that the Court of Appeal treated all the land as occupied by one of the two tenants, which was admitted not to be the case according to the legal meaning of occupation. And with all respect I do not think that any rule requires us first to examine the letterpress and then to discard the plan if we think the letterpress alone sufficiently clear. The whole should be looked at, and it may be that the plan will show that there is less clearness in the text than might appear at first sight. It is so in this case, certainly as to the part not in the occupation of either tenant, and in my opinion it is so also as to the strip in dispute. The description of the land as Bank Hey Farm does not help. The acreage is admittedly not precise and does not help. The description of the land as being in the occupation is not accurate. I think that the one accurate guide is this indorsed plan.

The only other point argued by the respondent's counsel was that there had been no breach of the implied covenant for title. The strip of land had been occupied by a railway company so long that they could not be disturbed, by virtue of the Statute of Limitations, and the vendor had taken no steps to protect himself against the growth of such a title—in fact, he suffered a sleeper fence to be erected on his land by the railway company. I think it is clear that he "omitted" to defend his own right and lost it by reason of that omission. Accordingly he is liable on the implied covenant.

In my opinion this appeal should be allowed.

LORD PARKER OF WADDINGTON. (1) My Lords, this is an action for damages for breach by the defendant of a covenant for good right to convey implied by virtue of the Conveyancing Act, 1881, in an indenture of conveyance dated June 28, 1911, and made between the respondent, Percy Ashton, of the first part, Albert Ball of the second part, and the appellant, Christopher William Eastwood, of the third part. The hereditaments conveyed by this indenture are conveyed—

(1.) as all that farm with the messuage, tenement or farm-house, barns, stables, outhouses, closes, or parcels of land belonging thereto called Bank Hey Farm, situate in the parish of Blackburn, in the county of Lancaster;

(2.) as containing 84 acres 3 roods and 4 perches or thereabouts;

(3.) as in the occupation as to part thereof of Thomas Haydock as yearly tenant thereof, and as to the remainder thereof of Charles William Cartman as half-yearly tenant thereof; and

(4.) as more particularly described in the plan indorsed on the said indenture, and therein delineated and coloured red.

There is nothing on the face of the indenture to show that any one of these descriptions in any way conflicts with any other. In order, however, to identify the parcels in a conveyance resort can always be had to extrinsic evidence, and the extrinsic evidence in the present case reveals the following facts.

The farm called Bank Hey Farm was at the date of the conveyance wholly in the occupation of Thomas Haydock. It had, however, in times past comprised, besides other parcels of land, (1.) a piece of land which at the date of the conveyance was let to Charles William Cartman as tenant by the half-year, and (2.) a small parcel of land which I will hereinafter refer to as "the disputed strip." Cartman's holding was not, however, at the date of the indenture wholly in his occupation; he occupied part of it consisting of a sandpit, but had sub-let the remainder for the purpose of hen runs, and his sub-tenants were in occupation. With regard to the disputed strip, neither Haydock nor Cartman had any interest therein. On the other

(1) Read by Lord Sumner.

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hand, both Cartman's holding and the disputed strip were, together with Bank Hey Farm, described, delineated, and coloured red on the plan indorsed on the conveyance. The question your Lordships have to decide is whether, under these circumstances, the disputed strip is comprised in and expressed to be conveyed by the conveyance in question. If it is not, the action must fail; if it is, your Lordships will have to consider whether there has been a breach of the covenant of good right to convey.

My Lords, the conveyance contains a recital to the effect that the hereditaments intended to be thereby assured were described as Lot 4 in the particulars of a sale by public auction on May 4, 1911. Where there is an ambiguity in the operative part of an indenture recourse may be had to the recitals to see whether they throw any light on the matter. Your Lordships are, therefore, at liberty to inquire what hereditaments were described as Lot 4 at the sale in question. Referring to the particulars used at this sale, your Lordships will find that Lot 4 is referred to as being the land coloured pink on plan No. 1, and on reference to this plan it will be found that the land thereon coloured pink is the same as that coloured red in the plan indorsed on the conveyance, and includes the whole of Cartman's holding and the disputed strip. Plan No. 1, however, contains a note to the effect that it is reproduced from the ordnance map, and is intended only for the purpose of indicating the position of the property, and is not to be deemed part of the contract of sale. If this were a question of specific performance of a contract entered into at the auction, it may well be, therefore, that no reliance could be placed on plan No. 1; but the question is what lands were described as Lot No. 4 at the auction, and in my opinion your Lordships are at liberty in considering this question to look at plan No. 1, at any rate for the purpose of ascertaining the position and situation of the lands so described.

Lot 4 in the particulars of sale is further described as Bank Hey Farm, estimated to contain 84 acres 3 roods and 4 perches. Part is said to be in the occupation of Thomas Haydock as yearly tenant, at an annual rent of 150*l.*, and part (not the

remainder) in the occupation of Mr. Cartman, at an annual rent of 25*l*. There is also the statement that the land from its situation would give a purchaser an easy opportunity for development, a statement which emphasizes the importance of the position of the property, as stated to be shown on plan No. 1.

These particulars show, therefore, that Lot 4 comprised all the land for which Thomas Haydock paid a rent of 150*l*., and all the land for which Cartman paid a rent of 25*l*., and there is nothing in them inconsistent with its comprising the disputed strip, which, though not rented to either Haydock or Cartman, is coloured pink on plan No. 1, and is from its position particularly important for development purposes.

My Lords, evidence was produced at the trial with the object of showing that even without the disputed strip the land conveyed comprised 84 acres 3 roods and 4 perches or thereabouts. This may well be so, but the disputed strip is so small in area that its inclusion in the land conveyed would not make up the total acreage beyond what could fairly be described as 84 acres 3 roods and 4 perches or thereabouts. The description by acreage may therefore be disregarded. There remain, therefore, three descriptions which have to be considered, and I would ask your Lordships to consider them one by one in reference to the recital that the property intended to be assured was the property described as Lot 4 in the particulars of sale. First, there is the description of the property as Bank Hey Farm; this, if taken alone, might very well exclude the whole of Cartman's holding, although such holding is clearly comprised in Lot 4 at the sale. It follows that this description, if not rejected, should at any rate be read as including some property which, though not forming part of the farm, had once done so. Secondly, there is the description by occupation; this, if taken alone, would exclude that part of Cartman's holding which, though in his possession as a matter of law, was in the occupation of his sub-tenants; but again it is clear that all Cartman's holding is included in Lot 4. It follows that this description, if not rejected, should be read as including not only what Cartman occupied, but all that of which he was tenant though he had

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parted with the occupation. There remains only the description by reference to the map indorsed. It seems to me that this is the only description consistent with the recital, and therefore ought to be preferred.

My Lords, I am inclined to think that I should come to the same conclusion even without reference to the recital in question. It appears to me that of the three descriptions in question the only certain and unambiguous description is that by reference to the map. With this map in his hand any competent person could identify on the spot the various parcels of land therein coloured red. The other descriptions could only be rendered certain by extrinsic evidence. Persons might well disagree as to whether the farm known as Bank Hey Farm comprised or ever had comprised this or that piece of land, and though occupation is a question of fact it might well be that the person named as occupier in fact occupied lands not included and never having been included in Bank Hey Farm. Where there are several descriptions which, when evidence of surrounding facts is admitted, are not consistent one with the other, I do not think that there is any general rule by which the Court can decide which description ought to prevail. But ceteris paribus it would seem that the more detailed and precise the description the more likely it is to accord with the real intention of the parties. It was suggested that help might be derived from the maxim, Falsa demonstratio non nocet. It is clear, however, that this maxim is useless unless and until the Court has made up its mind as to which of two or more conflicting descriptions ought under the circumstances to be considered the true description. When this is done the false description may, of course, be disregarded, and the maxim merely calls attention to this obvious result. There are in some of the authorities expressions from which it might be inferred that as soon as you have a description in a conveyance which, taken in connection with the extrinsic evidence, fairly identifies a particular parcel or particular parcels of land, that description should be adopted and everything subsequently contained in the indenture which in any way conflicts with it be rejected as a false demonstration. There are, however, numerous cases which show that the order in

which the conflicting descriptions occur is not at all conclusive. If such a principle as suggested were applied to the present case the result would be to exclude from the conveyance the whole of Cartman's holding as well as the disputed strip. It seems to me that under these circumstances the Court must in every case do the best it can to arrive at the true meaning of the parties upon a fair consideration of the language used and the facts properly admissible in evidence. In the present case I think that even without reference to the recital the description by reference to the map is the description which is meant to prevail, but the recital in my opinion is conclusive.

The remaining point which your Lordships have to consider arises in this way. The grantor, under the conveyance in question, had not at the date thereof any title to the disputed strip. His title thereto had been extinguished by virtue of the Statute of Limitations applicable to real estate. The covenant for good right to convey, implied under the Conveyancing Act, 1881, in the indenture of June 28, 1911, is to the effect that, notwithstanding anything by the person who conveys, or any one from whom he derives title otherwise than by purchase for value made, done, executed, or omitted, or knowingly suffered, the person who so conveys has, with the concurrence of every other person (if any) conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed. It is argued that a person against whom a statutory title is acquired under the Statute of Limitations cannot be said to have made, done, executed, or omitted, or knowingly suffered anything within the meaning of this covenant. It is quite true that he cannot very well be said to have done, made, executed, or knowingly suffered anything, but how can it be said that he has not omitted anything? The real reason why his title is extinguished is that, having a right of action against another, he has omitted to enforce such right for so long a period that the statute has run against him. It seems to me that this is an omission within the covenant.

I think, therefore, that the appeal should be allowed and the judgment of Sargant J. restored.

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LORD SUMNER. My Lords, the principle on which this case was decided in the Court of Appeal was thus stated by Parke B. in *Llewellyn* v. *Earl of Jersey* (1): "As soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it; according to the maxim falsa demonstratio non nocet," to which the words cum de corpore constat should be added to do the maxim full justice. In *Morrell* v. *Fisher* (2), where this principle is repeated, it is further said, "The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all; and so far as it is true, applies to one only." It is thus stated by Romer J. in *Cowen* v. *Truefitt, Limited* (3): "In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect." On the expressions "the addition" and "any subsequent erroneous addition," it should be observed that all the members of the Court of Appeal in the same case, all the more forcibly because they spoke obiter, protested against the view that it is material in what part of the sentence the falsa demonstratio is found.

The rule is undoubtedly ancient: see *Dowtie's Case* (4); though the consequences of an erroneous addition had been mitigated before Baron Parke's time. Later on in *Llewellyn* v. *Earl of Jersey* (5) that learned judge says of the clause in question, a very different one be it said from the present clause, "the portion conveyed is perfectly described, and can be precisely ascertained, and no difficulty arises except from the subsequent statement," namely, a statement as to the number of poles in the close. Finally, he austerely observes, "It is of much more importance that we should adhere strictly to legal maxims, than attempt to evade them to meet the supposed intention of the parties."

(1) 11 M. & W. 183, at p. 189.
(2) (1849) 4 Ex. 591, at p. 604.
(3) [1898] 2 Ch. 551, at p. 554; affirmed on other grounds [1899] 2 Ch. 309.
(4) (1584) 3 Rep. (1826 ed.) 9b, note to p. 10b.
(5) 11 M. & W. 183.

Without venturing to question or to qualify so inviolate a rule, I venture to think that it does not apply in the present case for the following reasons.

In the Court of Appeal little attention, if any, seems to have been directed to the evidence, scanty and rather vague, which was given as to the occupation of the premises, but, when the matter was gone into at your Lordships' Bar, it was very frankly admitted that, in the strict legal sense of the word, Cartman was not in "occupation" of the hen runs at all. Had the argument taken the same course in the Court below, no doubt a similar admission would have been volunteered, and then, I think, the decision would have been different.

The deed purports to convey parcels described in four different ways: (1.) by the name which the premises bear; (2.) by their acreage; (3.) by the names of those who, respectively, occupy part thereof and the remainder thereof; and (4.) by delineation and tint on a plan to scale indorsed on the deed. I say described in four ways advisedly. I recognize the difference made by saying "all which said premises are more particularly described in the plan," instead of "and all more particularly described in the plan." The latter simply continues the series of descriptions by another mode of description. The former is a relative sentence, to which the said premises are the antecedent. It qualifies but does not enlarge them. It furnishes details within the extent of the antecedent; it does not make additions to it. Still the word "described" is there, and when, as I think is the case, the description of the antecedent previously given is inconclusive and contradictory, the relative clause elucidates and completes the description of the antecedent, just because it supplies particulars of the content to a formless and indeterminate outline. Further, if the description is ambiguous, there is a recital which can be resorted to, which, though clumsily expressed, sends the inquirer to the conditions of sale, and to the description therein contained of Lot 4, the lot which is intended to be conveyed.

As long as only one species of description is resorted to in describing parcels no harm is done, and often only good, by copious enumeration of particulars all belonging to that species. If the description is by name, certainty is increased by naming

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every close which has a separate name; if by metes and bounds, by setting out every bound; if by admeasurement, by stating not only acres and roods, but also poles. To do this is always troublesome and often impracticable, but at least it is not a cause of uncertainty. If, however, several different species of description are adopted, risk of uncertainty at once arises, for if one is full, accurate, and adequate, any others are otiose if right, and misleading if wrong. Conveyancers, however, have to do the best they can with the facts supplied to them, and it is only now and again that confusion arises. The present is, I think, a case of such confusion, and a pretty tangle it is.

On paper the thing looks clear enough. There is no contradiction apparent on the surface. I do not suppose there often is. If the whole of the premises intended to be conveyed and no other premises had borne the name of Bank Hey Farm, the description would have sufficed. Unfortunately at the date of the conveyance the land let to Cartman was no longer part of that farm, which was all let to Haydock. Cartman's land had once upon a time been part of what was so called, but so had the disputed strip, and the evidence does not clearly show which first ceased to be part of the farm. Everybody agrees that this description by name is vague. It is common ground that more than the present farm was sold; but the area, which in the past was called Bank Hey Farm and is now the subject of the conveyance, is the very point in dispute. The given acreage, "or thereabouts," is vaguer still, seeing that the disputed strip is but a matter of a few hundred square yards, and the acreage described would be satisfied either with or without it. The description by occupation purports to be precise, and naturally weighed much with the Court of Appeal, as they understood the facts. I will assume that sooner or later, with more or less trouble, the purchaser could find out pretty accurately what the actual occupation was. Unfortunately, if "occupation" means "occupation," the clause is admittedly wrong, Unfortunately, also, what Cartman holds is not part of Bank Hey Farm now, and is not farmed at all. The two "occupations" between them purport to exhaust the whole of the premises conveyed, but it is common ground that something more is intended to be conveyed than is legally

in Haydock's and in Cartman's "occupation" together, namely, the hen runs. It is said that the true meaning is "what Cartman holds under his half-yearly tenancy." No one would guess that from the deed. It can only be argued by assuming sufficient doubt about the language of the deed to justify reference to the conditions of sale for explanation, and even those conditions by no means establish the contention; but I think the contention itself is fatal to the proposition that this description by occupation is either adequate or sufficient, certain or convenient or satisfactory. Neither is it a case where the false description applies to no subject and the true description to one only. The falsity, or rather the vagueness, of the first part, when supplemented by the last, is corrected and becomes a whole, which refers with adequate certainty to one subject and defines it fully. No question of rectification has arisen.

The result is that whether the descriptions by name, acreage, and occupation are taken together or taken singly, the description so constituted is the very opposite of that to which the rule in *Llewellyn* v. *Earl of Jersey* (1) applies. Hence the fourth description, that by the plan, must be taken account of. The plan is made to scale, and is traced from the Ordnance Survey, though it omits some of its features. It is decisive of the point in question. It shows that the disputed strip is part of the parcels conveyed, and that the hen runs, though not in Cartman's "occupation," are included also. It is only by resorting to the plan that the vendor conveys the hen runs, which he admittedly wanted to convey and says that he has conveyed. The only issue raised before your Lordships, namely, whether the disputed strip is or is not to be excluded from the area which otherwise is admittedly conveyed, is one which can only be raised by treating the area tinted red on the plan as part, and that the best part, of the description of the parcel.

On the second point I have little to say. If the vendor had said some years ago, "The Lancashire and Yorkshire Railway took possession of the part of my land which is now the disputed strip, but somehow I omitted to eject them; now the statute has run and I have lost the land," I cannot see how any one could

(1) 11 M. & W. 183.

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have cavilled at his use of the word "omit." I think that is the way in which it is used in the Conveyancing Act. If the vendor could restrict it to leaving undone those things which he ought to have done under some legal duty to others, purchasers would get little or no benefit by this covenant, and words would be read into the statute which it does not contain.

I think the judgment of Sargant J. should be restored.

LORD PARMOOR. My Lords, I concur, and I have not thought it necessary to prepare a separate opinion.

LORD WRENBURY. My Lords, the question here is of parcels. By the conveyance of June 28, 1911, did or did not the vendor purport to convey the disputed strip of land—to which he had in fact no title? After informing itself as to the surrounding circumstances to such extent as evidence is admissible in that behalf, the tribunal which has to resolve the question must resort to the language of the deed and to nothing else.

The parcels are described by reference to four matters—name, acreage, occupation, and plan. To this may be added, fifthly, a recital, to which within the limits which I will indicate resort may in my opinion be made.

In the Court of Appeal the Master of the Rolls decided the case upon the third of these, namely, occupation. Swinfen Eady L.J. referred to name, acreage, and occupation, but looking at the concluding sentences of his judgment he, I think, followed the Master of the Rolls in deciding the case upon the description by occupation. The dominant sentence in the judgment of the Master of the Rolls is as follows: "Is this anything more than a conveyance of that of which at the date of the sale and of the conveyance the vendor was the landlord and of which Haydock and Cartman were tenants? In my opinion it is not."

I am unable to accept this view. Such words as "in the occupation of A. as yearly tenant thereof" do not in my opinion state that he is tenant of the freeholder, the vendor. They are equally satisfied if the freeholder has demised for twenty-one years to X., and X. has demised to A. as yearly tenant, and A.

is in occupation. Further, I think that the words "in the occupation of A. as tenant" affirm two things, namely, that A. is both tenant and in occupation. If this be right the description by occupation was not in the view of either appellant or respondent accurate, for both sides agree that the whole of Cartman's holding passed, and the hen runs, which form part of it, were not in his occupation.

My Lords, it seems to me that a description by occupation is a description so inconclusive and so liable to error as that it ought to, and will readily, yield to any more accurate and convincing description. It is a description by reference to something which the purchaser may not know and may have no means of ascertaining. As between grantor and grantee I look preferably to something which will indicate plainly to the grantee what are the parcels which the grantor is assuring to him. Let me take the four heads of identification of the parcels in order.

First, the name, "Bank Hey Farm." Without evidence as to what meaning that name bears it conveys nothing. The reader is entitled to say, "This is but a name, it may mean anything. If I read on perhaps I may find what it means."

Secondly, the acreage. This (subject to something to be added presently) is but the superficial measurement of that which is included in the name, and carries me no further.

Thirdly, the occupation. I have dealt with this already. If occupation means occupation as distinguished from title, this description was confessedly inaccurate. If it means, not occupation but title as tenant of the vendor, it was true, but the language is not "as tenant of the vendor"; it would be satisfied if there were a tenancy in fact by some derivative title—a circumstance which the purchaser might neither know nor have any means of ascertaining. The purchaser might find the occupier and might from him learn what land he occupied and whose tenant he was, if he were willing to tell him. But he would not be bound to tell him, and the purchaser might be quite unable to reduce this description to certainty.

Then follows the description by plan. Here, for the first time, I find something as to which there is no question. Both grantor

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and grantee know, or by looking at the plan have the means of knowing, exactly what the parcels are.

My Lords, I find that the description by plan is couched in the words "all which said premises are more particularly described." The words "more particularly" exclude, I conceive, that they have already been exhaustively described. These words seem to me to mean that the previous description may be insufficient for exact delimitation, and that the plan is to cover all deficiencies, if any.

I will, however, assume, contrary to the opinion which I have already expressed, that the words as to occupation have a larger effect than I have given them; that the purchaser could by the tenancies identify the parcels; and that they differ from the parcels disclosed by the plan. At this point I may resort to the recital if it enables me to resolve the ambiguity of the operative part. I find that the recital tells me that by this deed it is intended to assure Lot 4 of the auction of May 4, 1911. I look at the particulars to see what Lot 4 was. I find by the schedule that it totalled to 84·778 acres, and that it is agreed is the same as the 84 acres 3 roods 4 perches mentioned in the conveyance and also in the earlier part of the particulars. That measurement of 84·778 acres is arrived at by including parts 731, 734, and 777 on the plan, and in these parts is included the disputed strip. Further, the particulars tell me that Lot 4 is coloured pink on the plan. The disputed strip is so coloured. The plan is to form no part of the contract, but it is introduced to show the position of the property. It tells me that part of the property sold is in the position occupied by the disputed strip. This, to my mind, is the same thing as if the vendor had walked over the property with the purchaser and pointed to the disputed strip and said, "That forms part of the Bank Hey Farm which I am selling to you by that name." The recital therefore tells me that it is intended to assure the disputed strip. If I am in doubt between two constructions, I ought to give the operative part that construction which gives effect to that intention.

My Lords, I reject as irrelevant a consideration which was urged at the Bar, that if the disputed strip is excluded the purchaser still gets 84 acres 3 roods 4 perches and more. The

question is, not what acreage he gets, but whether he gets the whole of that which the conveyance purports to pass to him, whether its acreage be less or greater than that stated in the deed.

My Lords, to my mind the description of the parcels in this conveyance is equivalent to a description of parcels expressed as being "Farm A., containing ( ) acres, in the occupation of B., more particularly described in a plan." In that description I find no accurate and exhaustive description before reaching the plan. B. may have adjoining lands in his occupation which are not part of farm A. The acreage may be more or less than that stated. The name may convey such and such plots, or may not. The earlier part is but a description (by reference to certain characteristics) of premises whose position and abutments are to be found on the plan.

We have heard an argument, interesting, but to myself unconvincing, upon s. 7 of the Conveyancing Act, 1881. The Railway Company and Chadwick, who acquired title to the disputed strip by adverse possession, are not persons through whom the vendor derives title. This being the fact, the purchaser, it is said, could not sue the vendor upon the covenant for quiet enjoyment implied by the section. The argument is that neither can he sue him upon the implied covenant for title, for that the statute cannot have intended that the vendor should be free from liability under the one head and be exposed to it under the other. It seems to me that the covenant for title exactly fits the case. The vendor has omitted to do something. His covenant is that notwithstanding that omission he has full power to convey. He has not such power, and is therefore liable on his covenant. It is contended that the vendor by allowing a title to be acquired by adverse possession has not "omitted or knowingly suffered," within the words of the Act. It was said that there can be no omission unless there was a duty. I cannot agree. Omission of a precaution, omission of an act which will assert title and exclude a squatter, are omissions just as much as is omission of a duty to another. The vendor owed no duty to the purchaser or any one else to intercept the squatter's title, but he lost his land because he omitted to do so.

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My Lords, for these reasons I agree that this appeal succeeds.

Order of the Court of Appeal reversed and judgment of Sargant J. restored. The respondent to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, June 10, 1915.

Solicitors for appellant: *Rawle, Johnstone & Co., for Read & Eastwood, Blackburn.*

Solicitors for respondent: *Witham, Roskell, Munster & Weld.*

[HOUSE OF LORDS.]

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FARMER (SURVEYOR OF TAXES) . . . . . APPELLANT;

AND

TRUSTEES OF THE LATE WILLIAM COTTON . . . . . RESPONDENTS.

Revenue—Inhabited House Duty—Separate Tenements—Customs and Inland Revenue Act, 1878 (41 & 42 *Vict. c.* 15), *s.* 13, *sub-s.* 1.

A large building once occupied as an hotel was let to a number of tenants, each tenant occupying premises consisting of one or more rooms. Access to all these premises was gained from a central staircase or from passages leading therefrom. All the premises were occupied for business purposes except a caretaker's house on the top floor and an eight-roomed dwelling-house entered from a passage on the second floor leading from the central staircase:—

Held (by Earl Loreburn, Lord Atkinson, and Lord Parker of Waddington, Lord Sumner dissenting), that the premises were "divided into and let in different tenements" within the meaning of s. 13, sub-s. 1, of the Customs and Inland Revenue Act, 1878, and that the owner of the house was entitled to relief from inhabited house duty in the terms of the sub-section.

Decision of the First Division of the Court of Session in Scotland (1913 S. C. 1126) affirmed.

APPEAL from interlocutors of the First Division of the Court of Session in Scotland in a case stated by the Commissioners for

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

the General Purposes of the Income Tax Acts and for executing the Acts relating to the inhabited house duties for the county of Edinburgh. (1)

The respondents (called the appellants in the stated case) appealed against an assessment to inhabited house duty made upon them for the year ending May 23, 1911, on the sum of 849*l.*, the annual value of their premises situated at No. 100, Princes Street, Edinburgh. The assessment was made under the House Tax Act, 1851 (14 & 15 Vict. c. 36), and the provisions of r. 6 of Sched. B of the House Tax Act, 1808 (48 Geo. 3, c. 55).

The facts appearing from the case were as follows:—

The premises, with the exception of that part of them occupied by Robert Smith, were originally built for and were occupied as an hotel, but after having been structurally adapted for use as in the year of assessment they had been for some years past, and during the year of assessment, so far as not occupied by the respondents' caretaker, let to a number of tenants who occupied the subjects let to them in some cases as offices, warehouses, or other non-residential purposes, and, in one case, as a dwelling-house. No part of the premises was occupied by the respondents personally, but their caretaker inhabited a house in the premises as hereinafter stated.

The premises consisted of a basement, ground floor, and five upper floors. Part of the ground floor of the building consisted of four shops structurally separated from the remainder of the building. The part of the basement beneath these shops was also structurally separated from the remainder of the building. Neither this portion of the basement nor these shops were included in the assessment appealed against. There was an entrance to the ground floor from Princes Street through an outer and an inner door opening into a large hall. In the hall there were a staircase and lift by which access was obtained to the upper floors; and there was also a staircase leading to the basement. Each tenant had a key of the outer door, which was locked at night. The inner door was a swing door which was never fastened.

(1) 1913 S. C. 1126.

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The basement was divided into two portions. Of these one consisted of a washing-house and drying-room used by the respondents' caretaker, off the latter of which a w.c. opened, and of a lobby which led to a coal-cellar used by the caretaker, and from this lobby a staircase gave access to the hall on the ground floor. From the washhouse a door gave access to a passage, off which there opened two coal-cellars belonging to and used by George Cotton & Sons, tobacconists, Princes Street. There also opened from the passage a door by which access was obtained to a flight of steps leading to a lane which communicated with Rose Street Lane. At the end of the passage there was a door giving access to an open court; and from that court a door gave access to the other portion of the basement. This other portion was occupied by Messrs. Oliphant, Anderson & Ferrier as a warehouse; and from it a stair gave access to that part of the ground floor which was occupied by that firm as a warehouse and office.

The ground floor consisted of the hall above mentioned, and of three rooms occupied by Messrs. Oliphant, Anderson & Ferrier as a warehouse and office. There was also a lavatory. Access to these rooms was obtained by a door opening into one of them from the hall. There was also an access to one of them by large doors opening upon Rose Street Lane. The firm also occupied a portion of the first and second floors; and the only access to this portion was by a staircase from one of the three rooms on the ground floor occupied by the firm.

The first floor consisted of rooms occupied by Messrs. Oliphant, Anderson & Ferrier, as above stated, of three rooms occupied by F. E. G. Hopp as an office, between two of which there was internal communication, of a single room occupied as an office by the World Missionary Conference, and of two rooms, between which there was internal communication, occupied as an office by the Empire Insurance Corporation. Each of these rooms had a door opening upon the passage which communicated with the staircase and lift. From this passage there was a door opening on to a small lobby. Access was obtained from this lobby by a door to a room occupied as a warehouse by A. Brown, by a second door to the office of the

Conservative Women's Franchise Association, and by a third door to two rooms occupied as an office by Messrs. Ashford, Thomson & Heaton. From the passage above mentioned there was a door opening into a small lobby from which access was obtained to a coal-closet and to two rooms occupied by the World Missionary Conference, between which two rooms there was internal communication. There were also a ladies' lavatory and w.c., access to which was obtained from a passage communicating with the staircase.

The second floor consisted of rooms occupied by Messrs. Oliphant, Anderson & Ferrier, as above stated, of a room occupied by Miss Fairley as an artist's studio, of two single rooms occupied by Mrs. Feely and Mrs. Fletcher respectively for business purposes, and of three rooms, between all of which there was internal communication, occupied as an office by Mr. M'Crow. There was also a coal-closet. Each of these rooms had a door opening upon the passage which communicated with the staircase and lift. There was also a large lavatory communicating with the passage. From this passage there was a door which gave access to the rooms occupied by Mr. Robert Smith as his dwelling-house. This house, which formerly was a separate house with its own access from the street, was held on a separate title and consisted of a lobby and four rooms entering therefrom on the second floor, used as a dining-room, drawing-room, bedroom, and kitchen, and four rooms used as bedrooms and a bathroom on the third floor. The only access to these last-mentioned rooms was by a staircase from the lobby.

The third floor consisted of the said four rooms and a bathroom occupied by Mr. Robert Smith and five rooms and a lavatory occupied by Cadbury Brothers, Limited. A door from the stair landing gave access to a passage with which each of the rooms occupied by Cadbury Brothers, Limited, communicated by means of a door. The door to the lift also opened upon this passage.

The fourth floor consisted of six rooms let to tenants and occupied for business purposes, and a lavatory. Two rooms were let to the World Missionary Conference, two rooms to the United Free Church Mission Study Council, one room to S. H. F.

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Capenny, and one room to the West Edinburgh Women's Unionist Association. Each room had a door opening from a passage which communicated with the staircase and lift. Off this passage at the west end there was a door which gave access to a stair which communicated with the house of the respondents' caretaker on the fifth floor. At the east end of the passage there was a door by which access was obtained to a stair leading to the fifth floor.

The fifth floor consisted of four rooms and a bath-room, occupied by the respondents' caretaker, which all communicated with the landing of the stair leading from the fourth floor to the caretaker's house; of three rooms, two of which were let and one was vacant; and of a place for the cistern and lift machinery. The only communication between the caretaker's house and the rest of the building was by means of a door on, and a stair leading from, the fourth floor. Each of the said three rooms had a door opening on to the landing of the stair leading from the fourth floor to them. The caretaker's house was structurally separate from these three rooms.

The case then gave a list of the occupiers of the various floors with the annual value of their holdings and stated that the various occupiers were entered in the valuation roll of the premises held by them respectively and were separately rated in respect of such premises.

For the respondents (the appellants in the case) it was contended that the only part of the premises in respect of which inhabited house duty was leviable was the house occupied by Mr. Robert Smith at a rent of 75*l.*, and that in terms of s. 1 of the House Tax Act, 1817 (57 Geo. 3, c. 25), s. 25 of the Revenue Act, 1867 (30 & 31 Vict. c. 90), and s. 13 of the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15). They further contended that in any event the said duty was not leviable in respect of the part of the premises which was unlet. They further maintained that as they were not liable in payment of the said duty on the remainder of the said premises, and as the house occupied by Robert Smith was the only house therein on which the duty was leviable, theywere not liable to be assessed for the duty upon the said house, and that the duty was

recoverable under the House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B (1.), from Robert Smith. They further maintained that the premises, so far as they were used as a dwelling-house, were used for the sole purpose of providing separate dwellings, and that by virtue of s. 11, sub-s. 1 (*a*), of the Revenue Act, 1903, the value of the caretaker's house being 12*l.* fell to be excluded from the annual value of the premises for the purposes of the said duty.

The surveyor of taxes contended that the building was correctly assessed as one subject under the sixth rule of Sched. B of the House Tax Act, 1808 (48 Geo. 3, c. 55).

That as the building was neither structurally divided into and let in different tenements nor occupied solely for the purpose of any trade or business, there was no exemption under either sub-s. 1 or sub-s. 2 of s. 13 of the Customs and Inland Revenue Act, 1878.

That s. 11 of the Revenue Act, 1903, had no application in that the building was not used for the purpose of providing separate dwellings within the meaning of that section, and, alternatively, that if it were so used relief could only be granted to the extent of 12*l.* in respect of the caretaker's house, which was the only dwelling-house of an annual value not exceeding 60*l.*

The Commissioners, having considered the facts and arguments submitted to them, held that the premises were not divided into and let in tenements within the meaning of the Customs and Inland Revenue Act, 1878, s. 13, sub-s. 1, and that s. 11 of the Revenue Act, 1903, had no application, and they refused the appeal.

The First Division (the Lord President (Lord Dunedin), Lord Kinnear, and Lord Mackenzie) reversed the determination of the Commissioners, and remitted the case to them to discharge the assessment.

March 12, 15. *The Attorney-General* (*Sir John Simon, K.C.*) and *the Solicitor-General for Scotland* (*T. B. Morison, K.C.*) (with them *W. Finlay, K.C.*, and *R. C. Henderson* (the latter of the Scottish Bar)), for the appellant. The Customs and Inland

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Revenue Act, 1878, s. 13, sub-s. 1 (1), grants relief from inhabited house duty where a house is "divided into and let in different tenements" to the extent to which such tenements are occupied solely for business purposes or are unoccupied. To fall within the exemption there must be both a letting and a division. The authorities show that there must be a structural division of the house into distinct and separate tenements each shut off from the other and each a self-contained unit in itself. A room in a house is not a separate tenement, and the conditions of the sub-section are not satisfied by the letting off of a number of rooms to different tenants: *Yorkshire Fire and Life Insurance Co.* v. *Clayton* (2); *Russell* v. *Coutts* (3); *Chapman* v. *Royal Bank of Scotland* (4); *Lord Walsingham* v. *Styles* (5); *Hoddinot* v. *Home and Colonial Stores* (6); *Grant* v. *Langston* (7); *London and Westminster Bank* v. *Smith.* (8) If this house were empty no one could say into how many tenements the house was divided. Further, the whole or substantially the whole of the building must be divided up for letting purposes, although it is not necessary that all the tenements should be let—*London and Westminster Bank* v. *Smith* (9)—and the occupation of several rooms

(1) Customs and Inland Revenue Act, 1878, s. 13, sub-s. 1: "Where any house, being one property, shall be divided into, and let in, different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be at liberty to give notice in writing, at any time during the year of assessment, to the surveyor of taxes for the parish or place in which the house is situate, stating therein the facts; and after the receipt of such notice by the surveyor, the Commissioners acting in the execution of the Acts relating to the inhabited house duties shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should, in their opinion, have been assessed, if it had been a house comprising only the tenements other than such as are occupied as aforesaid, or are unoccupied."

(2) (1881) 6 Q. B. D. 557; 8 Q. B. D. 421.

(3) (1881) 9 R. 261; 1 Tax Cases, 469.

(4) (1881) 7 Q. B. D. 136, at p. 144.

(5) (1894) 3 Tax Cases, 247.

(6) [1896] 1 Q. B. 169.

(7) [1900] A. C. 383, at p. 396.

(8) (1902) 4 Tax Cases, 503, at p. 520; 87 L. T. 244, at p. 246.

(9) 4 Tax Cases, 503; 87 L. T. 244.

in the house by the caretaker prevents the application of the sub-section. The Commissioners were not satisfied that this house was divided into or let in different tenements, and so far as this is a question of fact their findings are conclusive: *American Thread Co.* v. *Joyce.* (1) Assuming that this house is completely divided off into separate tenements, the premises occupied by the World Missionary Conference are not used for business purposes within the meaning of the sub-section: *Muat* v. *Stewart.* (2)

Clyde, K.C. (of the Scottish Bar), and *A. M. Latter*, for the respondents. This is a pure question of law. A house originally meant a structure in which a man lived with his family, but in modern times many questions have arisen as to the unity of a house, and there may be a house within a house and also an office within a house. The word "tenement" is used in s. 13, sub-s. 1, because it covers both these things. What constitutes a different tenement in the sense of the sub-section is a structural unity within a house such as to be capable of an independent and exclusive possession, and subject to this condition it is immaterial whether it consists of one room or a hundred rooms: per Lord Halsbury in *Grant* v. *Langston* (3); *Corke* v. *Brims.* (4) Further, the house must be devoted to letting purposes. But a caretaker is an indispensable appanage to the letting of a house in tenements, and the residence of the caretaker on the premises has never been held to affect the applicability of the sub-section. It stands on the same footing as the lavatories. The respondents admit that the whole house must be divided up, but the same tenant may occupy more than one tenement: *Smiles* v. *Crooke.* (5) When once the house comes within the sub-section the extent of the relief is measured by the extent to which the house is occupied for trade or business purposes. The question whether the missionary premises were so occupied was not raised before the Commissioners and there are no findings upon it. The Commissioners virtually assume that every part of the premises which was not residential was used for business purposes.

(1) (1913) 6 Tax Cases, 163.
(2) (1890) 17 R. 371; 2 Tax Cases, 601.
(3) [1900] A. C. 383, at pp. 390—392.
(4) (1883) 10 R. 1128.
(5) (1886) 13 R. 730; 2 Tax Cases, 162.

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The Solicitor-General for Scotland in reply. This case is covered by *Scottish Widows Fund* v. *Solicitor of Inland Revenue* (1) and *London and Westminster Bank* v. *Smith*. (2)

The House took time for consideration.

June 8. EARL LOREBURN. My Lords, I think the order of the First Division ought to be affirmed. The question depends upon the true meaning of the Customs and Inland Revenue Act, 1878, s. 13, and I had better state at once my own view of that section. In my opinion a house is "divided into and let in different tenements" when the rooms in it or groups of rooms in it are used and let for some purpose not common to the rest of the house and are divided off by any ordinary means, such as a door, and none the less so that the tenants of the different tenements use in common such things as kitchen, dining-room, staircase, or lavatory. If we are to make too much of structural separation we may be led away into inquiry whether one door is needed or two, whether a glass partition or a wooden screen will suffice, and so forth. If there is enough to isolate one room from the rest of the house so that it can be let separately, it will depend upon how it is let and how it is used, that is to say, used separately, or not separately, whether there is a different tenement or not. This is a question of fact, and I do not believe any formula can be devised which shall be of automatic application. Further, I think that the words "trade or business or any profession or calling by which the occupier seeks a livelihood or profit" are wide enough to cover all the species of vocation or work with which we are concerned in this case. So the only point is that first mentioned.

In the present case the Commissioners decided that the premises in question, 100, Princes Street, Edinburgh, were not divided into and let in different tenements within the meaning of the Act. And as their determination is conclusive unless it be erroneous in point of law, we have no jurisdiction to review it upon any issue of fact. We could, of course, interpose if it were clear that the Commissioners had proceeded upon a wrong construction of the Act, and I think they did by regarding the

(1) (1880) 7 R. 491. (2) 4 Tax Cases, 503.

question as one merely of structural separation; but they have not told us what construction they placed upon the Act. If it were necessary I should be disposed to move that this case be remitted for that information to be given. But I do not think it is necessary, because there is another ground of law upon which, I think, the Commissioners are wrong. There is, upon a true construction of the Act, no evidence in this case upon which their decision can be supported. They have given us the relevant facts in detail, and we can see for ourselves that, taking those facts as found, there are no materials at all upon which the conclusion they reached can be based. There was error in law because there was no evidence for their conclusion when the Act is rightly construed. Each of the rooms or groups of rooms with which we are concerned is divided by a door from other rooms and let to a different tenant and used for some business purpose of its own not common to the rest of the house. When this house was a hotel, as it was till recently, all the rooms were used for the common purpose of the whole building. The occupiers were guests, paying of course. Now each room is in its use isolated from the rest, and the occupiers are tenants. No better illustration could be given of what is meant by being divided and let in different tenements. On this ground the decision of the Commissioners ought to be overruled, but if the facts were such that on a true construction of the Act a different conclusion could reasonably be reached, then there would be no power in a Court of law to interfere.

I desire to say that when cases are stated for the opinion of a Court of law it is very much to be desired that the point of law should be clearly stated together with the decision upon it arrived at by the inferior Court. Otherwise it may prove difficult for a Court of law to distinguish between conclusions of law and conclusions of fact.

Lord Atkinson. My Lords, I concur in the judgment which has just been delivered by my noble and learned friend on the woolsack.

Lord Parker of Waddington. (1) My Lords, this is an appeal from a decision of the First Division of the Court of

(1) Read by Lord Sumner.

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Session upon a special case stated by the General Commissioners for the Purposes of Income Tax under s. 59 of the Taxes Management Act, 1880. The scheme of that Act is to make the determination of the Commissioners final and conclusive on all questions of fact, and to allow an appeal only on questions of law. The appeal is by way of special case stated by the Commissioners at the instance of the party aggrieved. In the special case the Commissioners are bound to set forth the material facts, and also their determination which is objected to as wrong in law. No Court has jurisdiction to go behind the facts so stated, but any Court which has seisin of the matter may reverse, affirm, or amend the determination of the Commissioners on any point of law.

My Lords, it may not always be easy to distinguish between questions of fact and questions of law for the purpose of the Taxes Management Act, 1880, or similar provisions in other Acts of Parliament. The views from time to time expressed in this House have been far from unanimous, but in my humble judgment where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only. The question in the present case is whether the facts found by the Commissioners with regard to a block of buildings situate in Princes Street, Edinburgh, and known as the "Windsor Buildings," entitle such buildings to the partial exemption from inhabited house duty provided by sub-s. 1 of the 13th section of the Customs and Inland Revenue Act, 1878. This question can only be determined by putting a construction on the sub-section in question, and, therefore, is one of law, on which the Court of Session had jurisdiction to reverse the determination of the Commissioners. The question before your Lordships is whether the Court of Session was right in so doing.

In considering this question it will, I think, be useful to direct your Lordships' attention in the first instance to the precise words of the section and sub-section in question. The words "any house" obviously mean any inhabited house assessable to duty, and it is admitted that the block of buildings in question

is such a house. To bring the section into operation the house must be "divided into and let in different tenements." Obviously "divided into different tenements" is not the same as "let in different tenements." It must refer to some sort of structural division which would secure to the occupier of each divided part the exclusive use of that divided part, affording a physical barrier against intrusion by others. The floor of a Corn Exchange let in stands to corn merchants would not in this sense be divided into different tenements. The tenement must be so structurally divided and separated as to be capable of being a distinct property or a distinct subject of lease. This is the criterion laid down by the Lord President in *Russell* v. *Coutts* (1), and approved by Lord Davey in *Grant* v. *Langston*. (2)

Besides being "divided into," the house must also be "let in" different tenements; but it has long been settled—and, I think, rightly settled—that the sub-section does not mean that every divided tenement must, in order to bring the sub-section into play, be the subject of an existing lease or tenancy agreement. If there be an existing intention to let the divided tenements, it is immaterial that one or more of them is or are for the time being unlet.

Again, although the sub-section will not be applicable where a substantial part of the house is retained or intended to be retained by the owner for his own occupation, still the mere fact that certain parts of the structure are appropriated for the common use of the occupiers of the divided tenements when let will not in every case prevent the section from applying. This is in accordance with reason and good sense, for obviously a house cannot be let in different tenements without common means of internal communication such as staircases, lifts, landings or corridors. In every case it must be a question of degree whether those parts of the structure which are so reserved for the common use of the tenants preclude the house from being "divided into and let in different tenements" within the meaning of the sub-section. Nor in my opinion will the fact that the owner finds it necessary, in order to let the different tenements,

(1) 9 R. 261. (2) [1900] A. C. 383, at p. 397.

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to provide in the building rooms for the accommodation of porters or caretakers deprive him of the benefit which the sub-section would otherwise confer. The occupation of such rooms may in law be the occupation of the owner, but it is an occupation not for his own convenience, but for the convenience of his tenants, and is a practical necessity if the house is to be let in different tenements at all.

My Lords, the sub-section in question clearly contemplates that the different tenements into which the house is divided may be let either for domestic purposes or as offices, or otherwise for business purposes. I cannot see, therefore, that the purposes for which the premises are to be used can throw any light on the meaning of the word "tenement" as employed in the sub-section. Sir George Jessel in the case of *Yorkshire Fire and Life Insurance Co.* v. *Clayton* (1) appears to have thought that the distinguishing mark of a "tenement" within the meaning of the sub-section must be that it constituted a house in law as opposed to a house in fact. I do not myself understand the meaning of a house in law as opposed to a house in fact, but if a house in law includes such things as shops, offices, or warehouses, which are not houses in ordinary parlance, there can be little objection to the test suggested, except that it throws no light on the meaning of the sub-section. The real test must remain (1.) actual structural division, and (2.) an intention to let the parts so structurally divided in separate holdings, for whatever purposes these parts be adapted or intended to be used. The mode or character of user is unimportant, except for the purpose of considering the extent of the exemption granted by the sub-section.

The only other point to which I need refer is that when once the divided tenements have been appropriated by the owner for separate letting, the mere fact that two of them are let to the same person, or included in the same lease, will not of itself be sufficient to prevent the section from applying: *Smiles* v. *Crooke*. (2)

My Lords, after carefully considering the facts stated in the special case and the arguments advanced by counsel, it appears

(1) 8 Q. B. D. 421. (2) 13 R. 730; 2 Tax Cases, 162.

to me that the only substantial objections to the applicability of the sub-section are (1.) that a door opening on a common passage or corridor is not a sufficient structural division to constitute that to which the door gives access a separate tenement within the meaning of the sub-section, and (2.) that a single room cannot be a tenement within the meaning of the sub-section. There was, it is true, some suggestion that the appropriation of certain rooms for the accommodation of a resident caretaker, or the common use by two or more tenants of the same lavatory, took the case out of the sub-section; but these points were not pressed by the Attorney-General, and I have already stated my own view on them.

The real points are those I have indicated, and accordingly it was strenuously argued that a tenement within the meaning of the sub-section could not consist of a single room, and that even if a single room could be a tenement within the sub-section, a single door shutting this room off from a common corridor was not, even though capable of being locked, a sufficient structural division. With regard to the latter point it may be observed that, in the case of houses divided into and let in flats, a single locked door separating each flat from a common staircase, landing, or corridor is the usual way of securing the occupiers of the flat from intrusion by others; and if such a door were held to be insufficient as a structural device for separating one flat from the rest of the building, I can hardly imagine any instance in which the section would be applicable at all. The real point, therefore, seems to be whether the tenements contemplated by the sub-section include single-room tenements. I cannot myself see any valid reason for excluding such tenements. Single-room tenements are not unknown in this country even for domestic purposes. Single-room offices or places of business are quite common, and inasmuch as the sub-section refers expressly to tenements occupied for the purpose of trade or business it would be strange if single-room tenements so occupied were outside the benefits conferred by the section.

The real difficulty in coming to this conclusion lies not so much in the words of the section itself as in the cases in which its meaning has been considered. In these cases there are no

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doubt a number of expressions pointing to the conclusion that a single room cannot be a tenement within the meaning of the section; but your Lordships' attention was not called to any case, nor have I been able myself to find any case, in which the point was actually decided or which would have been decided otherwise, if the interpretation of the section above suggested had been accepted. For example, the case of *Yorkshire Fire and Life Insurance Co.* v. *Clayton* (1), to which I have already referred, was clearly rightly decided if only for the reason that the owners of the building in question retained and occupied for their own purposes and never intended to let a considerable part thereof. In this case, too, one of the tenements into which the building was alleged to be divided consisted of a number of single rooms opening separately on a passage or corridor and having otherwise no connection with each other. There was no suggestion that each room constituted a divided tenement which had ever been appropriated for separate letting or been intended to be let separately.

Apparently, the idea that a single room could not be a tenement within the meaning of the section arose, not from a consideration of the words of the section itself, but from historical considerations. It is well known that the section was enacted to obviate the hardships felt to arise by reason of the decision in the case of *Attorney-General* v. *Mutual Tontine Westminster Chambers Association*. (2) In that case the tenements in question were tenements consisting of more than a single room. They were, however, the property of one owner, and therefore not distinct properties within the 14th rule of the Act of 1808. It appears to have been thought that the section passed to obviate the hardship entailed by this decision ought, therefore, to be confined to tenements of a similar character.

Lindley J. is said to have adopted this view when the case of *Yorkshire Fire and Life Insurance Co.* v. *Clayton* came before the Divisional Court. (3) If he did so it was with considerable hesitation. In my opinion, however, Lindley J. was not

(1) 8 Q. B. D. 421. (2) (1876) 1 Ex. D. 469.
(3) 6 Q. B. D. 557.

considering the case of single rooms let separately, but the case of a number of single rooms, each opening on a common corridor, let together, and it is not improbable that this mistake as to his meaning had considerable influence in determining what was said by other learned judges in later cases.

In my opinion a remedial section such as the one in question ought, if the words admit, to be construed to cover all cases where the hardship exemplified in the particular case which led to its enactment exists. It would have made no difference to the hardship if the tenements in the particular case in question had been single-roomed tenements. A house divided into single-roomed tenements being separate properties would have been within the 14th rule of the Act of 1808, but a house so divided being the property of one owner would not. There would be the same hardship. Why, therefore, should the remedial section be held inapplicable? I can see no reason.

Another case often relied on as an authority that a single room cannot be a tenement within the meaning of the 13th section is *Russell* v. *Coutts* (1), to which I have already referred. Here the house was clearly outside sub-s. 1, for the owner occupied a considerable part for his own purposes, part as a residence, and part, consisting of a single room, as a stamp office. An attempt was made to bring this stamp office within the 2nd sub-section, but this attempt failed on the ground that it was not a tenement within that sub-section, but a single room forming part of a larger tenement. I cannot read the case as a decision to the effect suggested.

Again, there is the somewhat similar case of *Clerk* v. *British Linen Co.* (2) Here, too, the owner occupied part of the house for his own purposes, and there was a room on the ground floor and certain rooms on the first floor let to a single tenant as offices. All of the rooms on the first floor opened on a common corridor and had no internal communication, and this common corridor formed also the access to the third floor. It was quite clear, therefore, that s. 13, sub-s. 1, could not apply. The decision does not really touch the point your Lordships have to decide.

(1) 9 R. 261. (2) (1885) 12 R. 1133.

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My Lords, there are other cases of a similar character to which I need not refer. None of them are really in point, even if they were binding on this Honse. Under these circumstances I do not think your Lordships need hesitate to put on the sub-section the construction I have suggested, if it otherwise commends itself to your Lordships' judgment.

I am of opinion, therefore, that the appeal should be dismissed.

LORD SUMNER. My Lords, in this case the Commissioners have furnished a description of the building in question, partly in words and partly by plans, so full that your Lordships know as much about it as they did. The rest is matter of law. The question is, "Does No. 100, Princes Street, Edinburgh, being such as we thus know it to be, come within the words of the Customs and Inland Revenue Act, 1878, s. 13, sub-s. 1?"

It was built as a dwelling-house, and once was an hotel. Several single rooms on various floors are separately let, as single rooms without accessories, for what I will take broadly to be business purposes. Collectively they form a substantial part of the entire house, and, as a house is only divided into a particular species of parts if it is all so divided, this circumstance alone would suffice to prevent the house from being "a house divided into and let in different tenements," unless each of these single rooms is held to be a "tenement" within the section. "Substantially all divided" no doubt opens the door to looseness, for it makes "all" mean not "all" but "nearly all," but I think that this cannot be helped. After all, a five-storey house must have stairs, and cannot well have five separate stairs, all giving access from the same street.

Inhabited house duty originated in 1778 (28 Geo. 3, c. 26), and from the first there has been special provision for the incidence of the duty, when a house is divided into different parts inhabited by different persons or families. From the first "tenement" was used in all the statutes as a term descriptive of a kind of such parts. It never seems to have had any precise

meaning. It has never received any statutory definition. It has never, so far as I can discover, meant a "room" simply. In 48 Geo. 3, c. 55, Sched. B, r. 6, "tenement" is used both as one of the parts of the house and as a homonym for the house itself. It succeeds in being at the same time the part and the whole. Similar elasticity is found in the Metropolitan Police Act (2 & 3 Vict. c. 47, s. 46), which provides in one and the same section that the police may "enter into any *house or room*" used for stage plays and not being a licensed theatre; that thereupon any person "keeping . . . . *any house or other tenement* for the purpose of being used as an unlicensed theatre" incurs penalties; and finally, that conviction therefor shall not exempt the keeper of "any such *house, room, or tenement*" from the penalties for keeping a disorderly house, on which see the judgment of Martin B. in *Fredericks* v. *Howie*. (1) Again, the Income Tax Act, 1853, s. 36, enacts that "any house or building, let in different *apartments or tenements* and occupied by two or more persons severally, shall nevertheless be charged as one entire *house or tenement*." Where there is a clear opportunity of using the word "tenement" as equivalent to one room it is carefully avoided. The statute 5 Geo. 4, c. 44, s. 4, which extends the exemption granted under 57 Geo. 3, c. 25, s. 1, to "any . . . tenement or building, or part of a tenement or building . . . used . . . . as offices or counting-houses," stops short of saying "*any room* in a building used as an office," or even "any tenement in a building used as an office," and, both by its language and by the provision that this exemption is not to extend to chambers in Inns of Court, shows that even the part of a tenement of which it speaks is something in the plural—something used as offices and similar to chambers in Inns of Court, which typically are aggregates of rooms. I think the first question on this appeal is: "Can a room—just four bare walls with a floor and a ceiling, with a window on one side and a door opening into a common corridor on the other, without any lobby or ante-room or other separation from the rest of the house than its interior walls and ceiling and floor—be held to be what the Act calls a tenement?"

(1) (1862) 1 H. & C. 381; 31 L. J. (M.C.) 249.

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"Tenement" in the sub-section is evidently something of which we can predicate that it is a sub-division of a house, and that it is capable of being let separately from other sub-divisions. This excludes the case of a one-roomed house. I suppose separate letting and occupation are what the word "different" really means, for the tenements cannot be the same and so far must be different, and there is no point in insisting that they need not be identically similar. Further, a tenement must be something which is capable of occupation for a business purpose. It is clearly a physical division. Mere letting does not divide, and mere separate letting does not in this sense make a tenement; but the section does not in terms indicate what the fashion of that physical division may be. Would an uncovered yard, a dark cellar, the cavity under the slope of a roof, a large verandah, a space on a floor undefined by any marks or bounds though capable of being ascertained and defined, fall within the term? Such questions are not fantastic. When a large building, put up for a special purpose,—an hotel, a sanatorium, a world's fair, or an amusement palace—fails of its purpose and comes down in the world, every part of it seeks its tenant, regardless of any original intention to divide or let it, and a good agent is ingenious to find a use and a rent for apparently useless spaces. It is hard to say what there is in the physical bounds of the single rooms in this case that qualifies them to be tenements. Is it because the space is visibly bounded? Then all houses are divided, or virtually divided, into tenements. Is it the roof? Is it four walls, or three, or two? Is it the window? I can hardly think it is the door or the materials of the wall, slender or substantial, permanent or temporary, transparent or opaque. A curtain to be drawn or a door to be left ajar might be as characteristic of a room as any other species of partition. Finally, the house must not only be capable of being let and occupied in different tenements, but it must be so let. I think it has been rightly decided to be enough if the whole is intended to be so let, though possibly at any given moment some of the tenements may be unlet. Nor does the section say divided into tenements and let in corresponding tenements or in an equal number of tenements. I do not see

anything to prevent more tenements than one being included in one letting or to require tenements so let in one hiring to be contiguous, or connected either laterally or perpendicularly. The question is, are they tenements?

My Lords, as the nature of things does not supply the meaning of the word, I seek it in the use of the word in ordinary speech when employed in such a connection as the present. I can scarcely doubt that from 1778 onwards there have been numerous instances in which houses of ordinary construction and containing many ordinary rooms have come to be inhabited separately, and often room by room, by separate persons or families; but I have been quite unable to find any instance in which, under any of the Acts in force from time to time, such rooms have been held to be, or have been spoken of as being, tenements, whereas in case after case it has been clearly said that they are not. The name has been held applicable to all sorts of groups of rooms, when contiguous and demarcated as a distinct group from the rest of the building by some definite physical feature, but to a plain single room, even when occupied for the purposes of business, never.

If the question be the meaning attached to a word among those who are accustomed to use it, I presume it does not matter whether the word is used in an obiter dictum, or in the very expression of a ratio decidendi. No case which binds your Lordships decides the point, not even *Grant* v. *Langston* (1); and as I take it that the bare word "tenement" has not a different meaning in sub-s. 2 of s. 13 from that which belongs to it in sub-s. 1, I conceive that cases on either sub-section are equally useful for this purpose.

"It is difficult," says Lindley J. in *Yorkshire Fire and Life Insurance Co.* v. *Clayton* (2), "to say what a 'different tenement' is, but my impression, which I get from the discussion in *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (3), is, that the expression indicates a tenement complete in itself, not mere rooms opening on to a common staircase." I think that on the facts this sentence was part of that very learned judge's ratio

(1) [1900] A. C. 383. (2) 6 Q. B. D. 557, at p. 561.
(3) L. R. 10 Ex. 305; 1 Ex. D. 469.

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decidendi, for some of the separate tenancies seem to have been tenancies of single rooms opening off a common passage. In affirming this decision, Jessel M.R. observes (1), "I understand 'tenement' . . . . to mean a legal house as distinguished from an ordinary house"—he is clearly referring equally to s. 13 as to r. 6 of Sched. B—and further on p. 424, "A meaning can be fairly given to the word 'divided,' if the word 'tenement' be read not as that which is held in tenure, but as that which in law is a house." Brett L.J., agreeing, says (p. 425) "the words 'shall be divided into different tenements' . . . . mean where the tenement which is part of the house is so structurally arranged that it may be used or actually occupied, as people in ordinary parlance would say, as a man's own house, office, shop, or warehouse. . . . . The question is whether it applies to the case now before us, which is that of a house which is not at all different in structure and arrangement from any ordinary house," and he then decides that it does not. So Cotton L.J. observes, "What is the meaning of 'shall be divided into different tenements' if it is to mean something different from separate lettings? Without dealing with all possible cases, it is sufficient to say that here there is no division of the house at all, except that which exists in all houses which have different floors and separate rooms."

Again, in *Chapman* v. *Royal Bank of Scotland* (2), Huddleston J. says, and not, I think, obiter, "From the description of this part of the premises given in the case, it does not appear that the upper floors are structurally divided into different tenements, though the different rooms, or portions of the premises, may be occupied by different persons." If, as in the present appeal, each occupier holds several rooms, and not one only, the case is a fortiori. Hawkins J., concurring, says (p. 144): "It was contended . . . . that the exemption applied when there was the mere letting of separate portions of the house, even though there was no structural division. I do not so construe the words . . . . there must be such a division, that any one going over the premises would say" (that is from the construction of the premises, not from the circumstances of the occupation) "'This is one tenement; that is another.' . . . . There must be a sort

(1) 8 Q. B. D. 421, at p. 423. (2) (1881) 7 Q. B. D. 136, at p. 141.

of division analogous to what we find in sets of chambers, and a great many of those mercantile buildings which have been erected to so great an extent lately in the city of London. There must be the letting of a separate tenement other than a mere apartment," and this he confirms at [1900] A. C. at p. 401. In *Lord Walsingham* v. *Styles* (1) the Divisional Court (Mathew and Cave JJ.) decided that Walsingham House did not come within the exemption granted by s. 13, sub-s. 1, on the ground that though "a large part is let out in separate tenements, ... the remainder are separate rooms opening on a corridor. There are servants' rooms, rooms devoted to the ordinary purposes of an hotel, a kitchen, and offices."

Lord Davey, in *Grant* v. *Langston* (2) (a case which does not decide this point), in adopting the definition of "tenement" given by Lord President Inglis in *Russell* v. *Coutts* (3), dwells upon the physical division which it involves, and equally adopts the words of Lord Shand in the same case: "The line must simply be drawn by looking at the particular premises and ascertaining whether they are so structurally shut off from the rest of the building occupied as to form an entirely separate tenement of themselves"; and I think that the expression of Lord Macnaghten on p. 395, "'tenement' is used as meaning a division or part of a house," is nothing to the contrary, since, in any sense of the word different from Lord Davey's, it would apply to a cupboard, or a chimney, or a drain.

To turn to the Scotch cases. In *Russell* v. *Coutts* (3) Lord President Inglis, having said that "the meaning of the word 'tenement' in this statute is a part of a house so structurally divided and separated as to be capable of being a distinct property or a distinct subject of lease," proceeded to hold that the large room used as a stamp office was not within the sub-section, saying that it was simply a room in Coutts's house: "such a room is not within the meaning of that sub-section," namely, sub-s. 2, while the writing chambers, which were a group of rooms structurally separate within the building, were held to be within sub-s. 1. In *Corke* v. *Brims* (4) the Lord President,

(1) 3 Tax Cases, 247.
(2) [1900] A. C. 383, at p. 397.
(3) 9 R. 261.
(4) 10 R. 1128.

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agreeing with the *Yorkshire Fire Insurance Case* (1), observes: "When you go up the stair to the second floor there is just a series of sitting-rooms and bed-rooms, each having its door opening into the common passage or staircase. A more thoroughly undivided house, in so far as physical division is concerned, it is almost impossible to conceive."

Both in this case and in *Clerk* v. *British Linen Co.* (2) the Court distinguishes *Russell* v. *Coutts* (3), by pointing out that when Coutts had gone in at his front door he had the means of ranging over the whole place, and, therefore, the separate rooms, though physically divided in a sense, were not such physical divisions as to be tenements. The tenor of the judgment in *Smiles* v. *Crooke* (4) is to the like effect. Before passing from the cases I will refer to the decisions of Walton J. in *Hillman* v. *Ankerson* (5) and also in *London County Council* v. *Cook* (6), where he held on a cognate statute, the Customs and Inland Revenue Act, 1890, s. 26, sub-s. 2, that a mere cubicle was not a "dwelling-place," saying that "that which is a bedroom, and nothing but a bedroom," is not a dwelling.

It may be said that these cases appear to confuse the word "tenement" with the words "divided into," and attribute to the former what really comes from the latter; but I think the answer is that the quality which is incorporeal in a tenement within the section is given by the words "let in," while that which is corporeal is given by "divided into," and tenement is still a general term, but, although general, more specific than "part" of a house. In the full width of Lord President Inglis's definition I do not see why a space on a floor, physically separated from the rest by a painted boundary line, or a safe in a safe deposit, might not be tenements. Each is divided from the rest so as to be capable of exclusive possession, of separate letting, and of use for business purposes. The same might be said of a locked-up cupboard.

(1) 6 Q. B. D. 557; 8 Q. B. D. 421.
(2) 12 R. 1133.
(3) 9 R. 261; 1 Tax Cases, 469.
(4) 13 R. 730; 2 Tax Cases, 162.
(5) (1906) 5 Tax Cases, 493.
(6) [1906] 1 K. B. 278, at p. 284.

Certainly, looking at the history of these Acts, and especially at 57 Geo. 3, c. 25, s. 1, 5 Geo. 4, c. 44, s. 4, and 32 & 33 Vict. c. 14, s. 11, "tenement" seems to have been used during more than a century in the sense of something which would have been a house, though only a little one, if it could. Circumstances and architects may have made it a house on the top of or underneath other houses, like a flat, or a house which is part of one storey, though, if it had been put on end by itself instead of being laid on its side in company with other similar houses, it would have been an independent little house. The indications of separate structure may be rudimentary. Expressions like "shut off" or "self-contained" may be vague. An ante-room or a lobby; a front door, even though there is no back door; a structural sub-division, which gives no support to the general structure, but only catches the eye or the fancy, may in this connection seem to receive an exaggerated importance. If we were free to resort to pure reason or to simple English, instead of being bound to construe a taxing Act, I daresay it would be better to get rid of all these niceties both in the building and in the enactment, and to say that tenement is nomen generalissimum and covers everything from a room to a phalanstery; but we are not. I will venture to adopt the language of Lord Halsbury with regard to sub-s. 2, only substituting for his word "decisions" the words "the language of the decisions": "The whole question is entirely covered by decisions, and certainly I am not disposed to alter, except for very strong reasons, that which has been accepted as the rule in a somewhat complicated and difficult question which the Legislature has called on His Majesty's judges to solve" (*London and Westminster Bank* v. *Smith* (1)). The object of the section, it is true, is remedial, and, as far as its language admits, it ought to be construed favourably to the taxpayer. Each of these lettings is separately rated, as we were told, and one would be glad that that which is separate enough to bear a burden for local purposes should be held to be separate enough to obtain an exemption for imperial purposes, but unfortunately that which is rated is a hereditament and that which escapes is a tenement. Such is law.

(1) 87 L. T. at p. 245.

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Lord Sumner.

My Lords, I think that there is a further difficulty in the respondents' way. If the caretaker's rooms are consistent with exemption it must be because they are caretaker's rooms as such, since the adverse decision of the Commissioners precludes any reliance on a distinction between a reasonable and an unreasonable amount of space for such purposes. Again, the result is the same if reliance is placed on the business necessity for having a resident caretaker, unless that necessity is too plain and universal to be gainsaid. There is no finding in the respondents' favour on the subject. Since this set of rooms is not separately let, the fact of its occupation by the caretaker prevents sub-s. 1 from applying in the accepted meaning of "wholly divided into, and let in, separate tenements," unless it can be said that a caretaker who resides on the premises is necessary to the letting of the premises in tenements, and not merely convenient. This certainly is not established. Some blocks of business premises have a caretaker resident on the premises and others have not. There is another difficulty. If the resident caretaker, and therefore the rooms which he occupies, be a necessity, like the common lavatory and the common stairs, I think his rooms, so regarded, though they are a tenement, are not a different tenement. If so, the house is not wholly divided into different tenements. On the other hand, if his rooms be regarded as what they really are, namely, his rooms, they are a tenement which is not let, and then the house is not wholly let in different tenements. It is only possible to give the go-by to the caretaker's rooms by theoretically assimilating them to the common stairs, which we know to be contrary to the fact, or by ignoring them and the difficulty which they present altogether, which virtually amends the Act so as to make them an exception.

As to sub-s. 2, 100, Princes Street is not a house or tenement occupied solely for business purposes, but is a private house or tenement structurally connected with a number of business houses or tenements and with some business premises which are neither.

With all respect I think that the appeal should be allowed and that the judgment appealed against should be

reversed and the decision of the Commissioners should be affirmed.

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Interlocutor of July 16, 1913, *of the First Division of the Court of Session in Scotland varied by inserting after the words "* 849*l.*" *the words "except that the duty relating to the tenement occupied by Robert Smith shall be retained by the Crown," and subject to such variation interlocutors appealed from affirmed and appeal dismissed with costs.*

Agents for appellant: *H. Bertram Cox (Solicitor for England of the Board of Inland Revenue), for Sir Philip J. Hamilton Grierson (Solicitor for Scotland of the Board of Inland Revenue), Edinburgh.*

Agents for respondents: *Capron & Co., for Henderson & Munro, W.S., Edinburgh.*

[HOUSE OF LORDS.]

LONDON COUNTY COUNCIL . . . . . APPELLANTS;

AND

CLODE AND OTHERS . . . . . RESPONDENTS.

H. L. (E.)* 1915 *June* 11.

Metropolis—General Line of Buildings in Street—Buildings erected beyond the General Line—Consent of Metropolitan Board of Works—Alteration of General Line—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 22.

The Euston Road was laid out in 1756 under an Act of Parliament which enacted that no buildings should be erected on new foundations in the road within fifty feet of the highway and that if so erected the buildings should be deemed to be common nuisances. This provision was repealed and re-enacted from time to time, but was ultimately repealed by the Metropolis Management Amendment Act, 1862, which enacted that no building should, without the consent in writing of the

* *Present:* EARL LOREBURN, LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

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Metropolitan Board of Works, be erected beyond the general line of buildings, if the distance of that line from the highway did not exceed fifty feet, such line of buildings to be decided by the superintending architect. This provision was repealed and substantially re-enacted by the London Building Act, 1894, the London County Council being substituted for the Metropolitan Board of Works.

There existed at the present time in the Euston Road a row of buildings about fifty feet back from the highway and a second row of buildings of irregular size and shape erected on the forecourts of the main buildings with frontages to the inner edge of the pavement, and substantially all these buildings had been erected before 1862. In 1867 some of the frontagers presented a memorial to the Metropolitan Board of Works praying that the inner edge of the pavement should be adopted as the general building line. The superintending architect reported that if the suggestion of the frontagers were found practicable the building line should be kept at least eleven feet from the kerb line of the road, and the Board passed a resolution recommending that the eleven-foot building line as proposed by the architect should be adopted as the general building line. In 1909 the lessee of the owners of a building in this road was proceeding to re-erect it on the eleven-foot line. The superintending architect being called in to define the general line of buildings certified that it was the old building line lying fifty feet back from the road, and his certificate was affirmed, as to the part of the road in question, by the tribunal of appeal :—

Held, (1.) that the resolution of the Metropolitan Board of Works, so far as it purported to alter the general building line, was ultra vires and ought to be disregarded; (2.) that, in defining the general line of buildings, such of the buildings in front of the old fifty-foot line as had been erected either unlawfully or with the consent of the proper authority ought to be disregarded; (3.) on the facts, that there was evidence to support the finding of the tribunal of appeal that the bulk of the buildings in the front row had been erected on new foundations.

Held, therefore, that the general line of buildings had been rightly defined by the superintending architect.

Decision of the Court of Appeal [1914] 3 K. B. 852 reversed.

APPEAL from an order of the Court of Appeal reversing an order of the Divisional Court upon a case stated under the London Building Act, 1894, by the tribunal of appeal constituted by that Act. (1)

In August, 1909, one Bousfield, holding under a building agreement from the respondents, was in the course of erecting a building on the site of Nos. 378, 380, 382 and 384, Euston Road, and on August 27 the appellants required the superintending

(1) [1914] 3 K. B. 852.

architect to define the general line of buildings on the northern side of Euston Road so far as related to the said building. On September 28, 1909, the superintending architect accordingly made a certificate under s. 22 of the London Building Act, 1894, by which he certified that the general line of buildings on the northern side of Euston Road between Hampstead Road and Osnaburgh Street was as defined by a strong red line on the plan annexed to the certificate, and he further certified, in effect, that the building in the course of erection was governed by the said building line.

The red line was drawn about fifty feet back from the edge of the pavement.

The respondents thereupon gave notice of their intention to appeal against the certificate to the tribunal of appeal, as did also several other parties, their contention being that the general line of buildings in the part of the Euston Road dealt with by the certificate was the inner edge of the pavement. These appeals were heard together by the tribunal of appeal and a considered judgment was delivered by the tribunal on all the appeals. The tribunal divided the distance from Osnaburgh Street to Hampstead Road into three sections, which, on a plan annexed to the judgment, they lettered (proceeding from west to east) $\frac{A}{A}$ to $\frac{C}{C'}$ $\frac{C}{C}$ to $\frac{D}{D}$, and $\frac{D}{D}$ to $\frac{E}{E}$, and they confirmed the certificate of the superintending architect as to that part of Euston Road in which the building now in question was situate, namely, between the points $\frac{C}{C}$ and $\frac{D}{D}$, and reversed the certificate as to the two other sections of the road. The respondents being dissatisfied with the decision of the tribunal required them to state a special case. In the other appeals no further proceedings were taken.

The material facts appearing from the special case and the judgment of the tribunal of appeal, which was incorporated therewith, may be thus stated.

The Euston Road was made in or soon after the year 1756 under an Act 29 Geo. 2, c. 88, which provided that no buildings should be erected on any new foundation by any proprietor or occupier of lands adjacent to the new road within fifty feet

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of the road, and that if any such buildings should be thereafter erected the same should be deemed common nuisances. These restrictions on building were continued by two Acts passed in the reign of George III. and were made perpetual by an Act passed in the year 1826, 7 Geo. 4, c. cxlii., s. 140.

The Metropolis Management Act, 1855, s. 143, provided that no building should, without the consent in writing of the Metropolitan Board of Works, be erected beyond the regular line of buildings in the street in which the same was situate, in case the distance of such line of buildings from the highway did not exceed thirty feet, or within thirty feet of the highway where the distance of the line of buildings therefrom amounted to or exceeded thirty feet. This Act did not repeal 7 Geo. 4, c. cxlii.

The Metropolis Management Amendment Act, 1862, s. 75, repealed (subject to the proviso in s. 108) s. 140 of 7 Geo. 4, c. cxlii., and s. 143 of the Metropolis Management Act, 1855, and enacted that no building should, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street in which the same was situate, in case the distance of such line of buildings from the highway did not exceed fifty feet, or within fifty feet of the highway where the distance of the line of buildings therefrom amounted to or exceeded fifty feet, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being, and that in case any building should be erected without such consent it should be lawful for the local authority to make complaint thereof before a justice of the peace.

The London Building Act, 1894, repealed (subject to the provisoes in s. 215) s. 75 of the Metropolis Management Amendment Act, 1862, and in effect re-enacted it by s. 22 (1),

(1) London Building Act, 1894, s. 22, sub-s. 1: "No building or structure shall, without the consent in writing of the Council, be erected beyond the general line of buildings, in any street or part of a street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway, when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwith-

substituting the London County Council for the Metropolitan Board of Works.

The tribunal, after viewing the premises, found the facts as to the position of the buildings in the Euston Road were as follows: There was now and had been in existence for many years a more or less continuous line of buildings situated about forty-eight to fifty feet from the pavement, and some at a slightly greater distance, between the limits $\frac{C}{C}$ and $\frac{D}{D}$; and there was also at the present time a row of buildings of considerable age abutting on the inner edge of the pavement between the limits $\frac{A}{A}$ and $\frac{E}{E}$ for the whole length of the frontage. These were regular in frontage but irregular in height and consisted of one, two, three, and four storey buildings. The buildings at the back were many of them separated from the front buildings by yards and other vacant spaces intervening. In other cases the front buildings had the appearance of having been built out from the back buildings of which they now formed part, and in some few cases the back and front buildings could not be distinguished one from the other. Some of the buildings brought out were internally on the ground floor so completely joined to the back buildings that they did not on this floor show any dividing line.

In 1866 one Bauman, the owner of No. 316, Euston Road, was charged before a magistrate with having erected a building beyond the general line of buildings in the street in contravention of s. 75 of the Metropolis Management Amendment Act, 1862. He had obtained the consent of the Metropolitan Board of Works to put up a one-storey building in front of his house and he proceeded to erect a three-storey building. The magistrate ordered the demolition of so much of the building as was beyond the general line of buildings, and his order was affirmed by the Court of Queen's Bench: *Bauman* v. *Vestry of St.*

standing there being gardens or vacant spaces between the line of buildings and the highway. Such general line of buildings shall, if required, be defined by the superintending architect by a certificate, such certificate to be issued within one month from the date of the application therefor."

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Pancras. (1) It was stated in the report that on the day before the hearing of the complaint the superintending architect had certified that the general line of buildings was the original line of buildings. The respondents (the appellants in the case) objected that this report was not evidence against them, and the tribunal of appeal held that the report was inadmissible as being res inter alios acta.

Pending the appeal to the Queen's Bench Bauman and a number of other owners and occupiers of houses in the Euston Road presented a memorial to the Metropolitan Board of Works stating that the memorialists had shops, warehouses, and other buildings in the front portion of their premises and immediately adjoining the foot pavement and had adopted as a uniform line of frontage for such buildings the line where their private property adjoined the foot pavement, and praying that such line should be established as the line of building frontage for all purposes. Mr. Vulliamy, the superintending architect of the metropolitan buildings, made a report on this memorial on May 9, 1867, and presented it to the Metropolitan Board of Works. In this report he recommended that if the proposal contained in the memorial were found practicable so as to adopt a new and regular frontage the line should be kept at least eleven feet from the kerb line of the road. A plan annexed to this report showed both sides of the Euston Road between Osnaburgh Street and Hampstead Road on the north and Cleveland Street and Tottenham Court Road on the south, and on the plan the existing line of frontage was tinted pink and the proposed line of frontage was tinted blue. The pink colouring followed the fronts of buildings shown on the plan. The fronts of these buildings as between the limits $\frac{C}{C}$ and $\frac{D}{D}$ were substantially identical with the fronts of the buildings now standing about forty-eight to fifty feet from the edge of the pavement. This plan also showed buildings abutting on the pavement substantially identical with those now existing, except that many of these buildings now consisted of more storeys than were shown on the plan. The proposed line of main frontage as shown by the blue colouring was the line of

(1) (1867) L. R. 2 Q. B. 528.

frontage eleven feet from the kerb line recommended in the report.

On November 12, 1867, a committee of the Metropolitan Board of Works reported to the Board that they were of opinion that the proposed lines of frontage as tinted blue on the plan should be adopted as the general lines to which buildings might be permitted to be erected, and they recommended that the proposed lines of frontage as tinted blue on the plan should be approved. The recommendations of the committee were approved and adopted by a resolution of the Board on November 15, 1867. The resolution of the Metropolitan Board of Works was forwarded to the Vestry of St. Pancras, and in consequence thereof the vestry passed a resolution on January 22, 1868, that all further proceedings against Bauman should be discontinued. The tribunal were of opinion that the plan and report were prepared, the recommendation was made, and the resolutions were passed in connection with a proposal for fixing a new building line and were not intended to be and were not a decision or anything in connection with a decision as to the general line of buildings.

The tribunal, after finding the position of the buildings in the road as above set out, stated the principle upon which they considered they were bound to act as follows: "If our duty consisted in merely defining the general line of buildings between Hampstead Road and Osnaburgh Street, taking into consideration the whole of the buildings which now exist, we could come to no other decision than that the general line of buildings is the inner edge of the pavement. We must, however, in defining the general line of buildings in any street or part of a street, place, or row of houses in which the same is situate (having regard to the cases of *Scott* v. *Carritt* (1) and *London County Council* v. *Metropolitan Ry. Co.* (2)) treat as non-existent buildings of the following classes:—

"Firstly—Buildings lawfully there but erected by consent of the proper authority (in this case the Metropolitan Board of Works or the London County Council) which would have been unlawfully there unless they had been erected by such consent.

(1) (1900) 82 L. T. 67. (2) [1909] 2 K. B. 317.

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"Secondly—Buildings not lawfully there. These are of two classes: (*a*) buildings for which consent was necessary but for which no consent was obtained; and (*b*) buildings erected in defiance of the law and to the erection of which no authority had power to consent."

The tribunal examined a number of leases, conveyances, and mortgages and also admitted in evidence two maps called Horwood's Map of London, 1793, and Horwood's Map of London, 1819, which were tendered by the appellants (the respondents in the case) for the purpose of showing the buildings adjoining the road at those respective dates and the non-existence of any buildings not appearing thereon, but which were objected to by the respondents. It was now conceded by the appellants that these maps were inadmissible. The tribunal found that the buildings as to which consents or refusals of consent had been shown were so few in number that the general line of buildings at the inner edge of the pavement would not be affected by their absence, and they stated their opinion that the case really depended on whether they were to consider as non-existent the bulk of the buildings abutting on the pavement as to which there was no direct evidence of consent or refusal. They also found that there was a general line of buildings in 1855 and afterwards, and that all the buildings abutting on the pavement were in front of such general line. It followed in their opinion that such of the buildings under consideration as were erected after the Act of 1855 must be presumed to have been erected by consent unless again they were erected on old foundations, and they found that the buildings on old foundations were so few and occupied such a small frontage that they did not affect the general line of buildings and could in that respect be disregarded. Substantially, therefore, all the buildings abutting on the pavement ought to be disregarded. In the result, as between the limits $\frac{C}{C}$ and $\frac{D}{D}$, they confirmed the certificate of the superintending architect.

The question for the opinion of the Court was whether upon the facts above stated so far as regards the defining of a general line of buildings between the limits $\frac{C}{C}$ and $\frac{D}{D}$ shown on the plan

attached to the order of the tribunal their said order was right in law.

In the Divisional Court Ridley J. held that the tribunal were right in upholding the certificate. Lush J. on the contrary held that they were wrong and that the general line of buildings was the inner edge of the pavement, but as the junior judge he withdrew his judgment, with the result that the determination of the tribunal of appeal was affirmed.

The Court of Appeal (Vaughan Williams, Kennedy, and Swinfen Eady L.JJ.) reversed the order of the Divisional Court and agreed with the opinion of Lush J.

April 22, 27, 29; May 4, 6. *Upjohn, K.C.*, and *F. F. Daldy*, for the appellants. The tribunal of appeal, who are the tribunal to determine the facts, have found that so long ago as 1855 there was in fact a general line of buildings fifty feet back from the road and that there were then as there are now a good many buildings in front of that line. Putting aside the buildings on old foundations, which are so few that they do not affect the question, either the buildings in front of the line are illegal structures and common nuisances—*Scott* v. *Carritt* (1)—or they have been built by consent of the proper authority, and in either case qua building line they ought to be disregarded: *London County Council* v. *Metropolitan Ry. Co.* (2); affirmed since the decision of the tribunal of appeal sub nom. *Fleming* v. *London County Council.* (3) That case shows that no number of consents to the erection of buildings in front of the building line can affect the building line, and that no general permission by the authority in advance will do away with the necessity of obtaining consent in the future. The Court of Appeal have based their decision upon the resolution of the Metropolitan Board of Works in 1867 and have held that, whatever was the effect of that resolution, as soon as it was acted upon it became binding. If, as Lush J. said, the resolution of the Board was a general invitation to treat the eleven-foot line proposed by their superintending architect as the general building line, it was an

(1) 82 L. T. 67. (2) [1909] 2 K. B. 317.
(3) [1911] A. C. 1.

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invitation to break the law and was clearly ultra vires, for neither the architect nor the Board had any power to alter the existing building line. It was equally ultra vires if it operated as a general consent in advance to build beyond the building line, for a public authority entrusted by Parliament with a power to consent cannot exercise by anticipation their discretion as to granting or refusing consent: *Ayr Harbour Trustees* v. *Oswald.* (1) Assuming that the resolution operated as a consent, it could not affect the building line; it merely established a series of exceptions. If on the other hand the resolution be regarded as an indication of the principle upon which the Board would be prepared to consent to buildings beyond the building line, it is innocuous inasmuch as it did not purport to affect the building line. Then it is said by Lush J. and the Court of Appeal that money has been spent on the faith of this resolution, but, first, there is no finding to that effect by the tribunal of appeal and no case was made by the respondents of any kind of estoppel by conduct; and, secondly, the Metropolitan Board of Works were a public body holding their powers in trust for the public, and the fact that the resolution has been acted on is not a reason why the public should be deprived of their access to light and air: *Islington Vestry* v. *Hornsey Urban District Council.* (2) There being at the time of the passing of the Metropolis Management Amendment Act, 1862, a general line of buildings fifty feet back from the road, the duty of the superintending architect under that Act was (if called upon) to define the building line in accordance with that general line of buildings. His duty under that Act was not to lay down a new line, but to determine where the existing line was: *Spackman* v. *Plumstead Board of Works.* (3) A conviction may be obtained for building beyond the building line in fact before there has been any decision on the point by the architect: *Wandsworth Board of Works* v. *Hall.* (4) The proper expression when a building line has been defined by the certificate of the superintending architect is an evidenced building line, but the building line is a thing which exists in rerum

(1) (1883) 8 App. Cas. 623.
(2) [1900] 1 Ch. 695, at p. 705.
(3) (1885) 10 App. Cas. 229, at p. 242.
(4) (1868) L. R. 4 C. P. 85.

natura and it cannot be altered except by some alteration in the res: *Lilley* v. *London County Council.* (1) This case is governed by *Fleming* v. *London County Council.* (2)

Macmorran, K.C., and *C. Herbert Smith*, for the respondents. In 1867 there was substantially a line of buildings abutting on the pavement; therefore the inner edge of the pavement was the building line, unless the tribunal of appeal were bound to disregard buildings as to which the consent of the authority had been obtained and buildings erected in defiance of the law. So far as the records go the bulk of the buildings abutting on the pavement have always been there and there is a presumption in favour of their legality. In order to show that a building is a common nuisance it must be built on a new foundation, and the remedy is by indictment. The charge would be that the accused had erected a building within fifty feet of the road on new foundations so as to be a common nuisance. It is for those who assert that these buildings are on new foundations to prove it, but the appellants have failed to discharge that onus. Except Horwood's two maps, which it is now conceded are inadmissible, the appellants have offered no evidence in support of that allegation. The tribunal of appeal have placed the onus on the wrong shoulders. If these buildings were improperly disregarded the only alternative building line is the pavement line.

Scott v. *Carpitt* (3) and *Fleming* v. *London County Council* (2) are distinguishable on the grounds stated by the Court of Appeal.

Upjohn, K.C., in reply. The argument of the respondents confuses two different kinds of procedure, building line procedure and criminal procedure. The determination of the building line is not a litigious proceeding and no question of burden of proof arises. Further, there is ample evidence apart from the maps to support the findings of the tribunal of appeal.

The House took time for consideration.

June 11. LORD PARKER OF WADDINGTON. (4) My Lords, that part of the Euston Road which is the subject of this appeal was

(1) [1910] A. C. 1.
(2) [1911] A. C. 1.
(3) 82 L. T. 67.
(4) Read by Lord Sumner.

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constructed under the Act 29 Geo. 2, c. 88. It was to be forty feet wide at the least, and the trustees entrusted with its construction were to be at liberty to pull down and remove such buildings as they should think necessary. The Act further provided that no building should be erected on any new foundation by any proprietor or occupier of land adjacent to the said new road within fifty feet of such road, and any building erected contrary to this provision was to be deemed a common nuisance. The Act thus created a statutory building line fifty feet back from the new road on either side, and it is reasonably clear on the evidence that this statutory line was at first observed by the proprietors of the adjacent lands, for there is a distinct line of old buildings on either side of the road fifty feet or thereabouts from the road itself, at any rate in that part of the road with which your Lordships are concerned for the purpose of this appeal.

There can be no doubt, however, that there exist at the present day, between the line of old buildings and the road, a number of other buildings, of irregular shape and size, extending right up to the line of the pavement; buildings which for the most part have the appearance of having been erected from time to time on the forecourts or open spaces lying between the buildings on the statutory line and the road. There is not, as to any particular one of these irregular buildings, any evidence that it was not erected on an old foundation, but there is, in my opinion, ample evidence, quite irrespective of the old maps, which were wrongly admitted before the tribunal of appeal, that the bulk of these irregular buildings did not exist at the date of the passing of the Act. This, indeed, may be gathered from the Act itself, which describes the new road, in the part in question, as crossing certain lands and grounds belonging to the Duke of Portland and others, and, even apart from this, it is quite impossible to suppose that the Act would have prescribed a building line fifty feet back from the road, had there already existed a continuous line of buildings extending right up to the road itself. Again, it is equally impossible to suppose that the adjacent proprietors would have erected a line of buildings fifty feet back from the road had these fifty feet been already built over. The Act is obviously framed on the footing that,

though here and there there may be buildings on old foundations within the fifty feet, the building line to be constituted when the adjoining lands came to be developed for building purposes could, notwithstanding these exceptional cases, be placed fifty feet back from the road itself.

The Act of 29 Geo. 2, c. 88, was originally enacted for a term only, but after having been renewed from time to time by other statutes it was made perpetual by 7 Geo. 4, c. cxlii. The last-mentioned Act was, however, repealed by s. 75 of the Metropolis Management Amendment Act, 1862, which enacted (ss. 75 and 76) in lieu of its provisions that "No building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect of the Metropolitan Board of Works for the time being." In giving their consent the Metropolitan Board had power to annex conditions. Any building erected, altered, or raised within the fifty feet without such consent, or otherwise than in conformity with the conditions annexed to such consent, was liable to be demolished.

It seems to me reasonably clear on the construction of the last-mentioned Act that the superintending architect to the Metropolitan Board had no power to prescribe what should be the building line, but merely to decide what such building line was in fact. Similarly the powers of the Metropolitan Board did not extend to prescribing or altering the existing building line, but merely to consenting in particular cases to such line not being observed by the adjacent proprietor.

My Lords, it appears that in 1867 one Bauman, the proprietor of lands adjoining the Euston Road, though not in that portion thereof which is the subject of the present appeal, erected a building beyond the line which the superintending architect to

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the Metropolitan Board of Works decided to be the general line of buildings. He did this contrary to a condition as to height which the Metropolitan Board had annexed to their consent, and accordingly was ordered to demolish such part of the building as extended beyond the general line. Thereupon a number of proprietors of lands in the Euston Road, including the respondents' predecessor in title, presented a memorial to the Metropolitan Board of Works praying that the proper officer of the Board might be authorized to determine that the general line of buildings in the Euston Road was the inner edge of the pavement on either side. This memorial, which appears to have been presented under a mistaken view of the law, the Board having no power to prescribe a building line, was referred to the superintending architect, who reported that if the suggestion were found practicable, the building line should be kept at least eleven feet from the kerb line of the road. Annexed to the report was a plan showing the proposed new building line, and also the existing general line of buildings as the architect conceived it. This report came before the Buildings Committee of the Metropolitan Board, who recommended that the architect's proposed line of frontage, as shown on his plan, be approved, but that it be a condition that any buildings to be erected thereafter on the northern side of the Euston Road between Osnaburgh Street and the Hampstead Road be kept to an extreme general line from ten feet to eleven feet from the outer edge of the kerb to the foot pavement, so as to preserve a uniform line as shown on the plan, and that on the southern side of the road the foot pavement be in like manner kept to a uniform width of eleven feet. This recommendation was on November 12, 1867, adopted by a resolution of the Metropolitan Board of Works.

My Lords, so far as this resolution purported to alter the building line in the Euston Road, it was, I think, clearly ultra vires. Whether it could or could not operate as an unconditional consent to the memorialists erecting buildings at their pleasure nearer to the road than the existing general line of buildings need not be determined, for the question does not arise on this appeal, and may arise in future.

The Court of Appeal, however, appear to have based their

decision upon the resolution, which had, in their opinion, been so extensively acted upon by the adjacent owners that the actual line of buildings in the road had, in fact, been altered. In this I think they were under a misconception. The only finding of the tribunal of appeal on the subject is that the buildings now abutting on the pavement are substantially those shown in the architect's plan. This shows that the resolution had not extensively been acted upon in the sense of the erection of any substantial number of new buildings, though existing buildings may have been raised on the strength of it. The heightening of an existing building cannot in any way affect the de facto line of buildings, and there can be no question of any estoppel. I do not, however, think that the resolution, however extensively it may have been acted on, could have any legal operation, except possibly by way of consent to what would otherwise be unlawful. What happened in 1867 may therefore be disregarded.

My Lords, the provisions of the Metropolis Management Amendment Act, 1862, were repealed but substantially re-enacted by the London Building Act, 1894. This Act provides (s. 27), "The consent by the London County Council" (who had succeeded to the powers of the Metropolitan Board of Works) "to the erection of any building or structure beyond the general line of buildings in any part of a street, or the erection of such building or structure, shall not be deemed to affect or alter in that or any other part of the street the general line of buildings as existing at the time of such consent." Further, the 216th section provides that all consents given under the repealed Act of 1862 are to have the same validity and effect as if given under the London Building Act of 1894. It was argued that, having regard to this provision, the 27th section in effect applies to consents given by the Metropolitan Board of Works. It is, however, unnecessary to decide this point, for your Lordships held in the case of *Fleming* v. *London County Council* (1) that, quite irrespective of ss. 27 and 216, neither the consent of the Metropolitan Board of Works under the Act of 1862 to the erection of buildings beyond the general building line, nor the erection of such buildings, operated to alter the building line. It is said

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that your Lordships' decision related only to individual consents and did not apply to such a general consent as contained in the resolution of the Metropolitan Board. This seems to have been the view adopted by Lush J. in the Divisional Court and by Kennedy and Swinfen Eady L.JJ. in the Court of Appeal.

I do not think that *Fleming's Case* (1) can be thus distinguished. If it could, it would follow that the Metropolitan Board had power to alter the building line, though they clearly had no such power. The power of consent conferred on them was a power enabling them to take individual cases out of the general prohibition as to building beyond the building line. They could not, under disguise of a general consent, abrogate this general prohibition. In my opinion the ratio decidendi in *Fleming's Case* (1) is applicable to the resolution in question if, and so far as, such resolution has any legal effect at all. It follows that in determining the general line of buildings the superintending architect was bound to ignore buildings rendered lawful only by the consent of the Metropolitan Board of Works or the London County Council. A fortiori he was, I think, also bound to ignore buildings proved to have been erected beyond the general line of buildings without any such consent or contrary to the provisions of the Act of 29 Geo. 2; all such buildings being unlawful.

My Lords, it remains to deal with the argument most relied on before your Lordships, which may be stated as follows: The tribunal of appeal find that those buildings as to which consent or refusal of consent had been proved were so few in number that the general line of buildings at the inner edge of the pavement would not be affected by their absence. From this it was said to follow that very nearly all the buildings in front of the building line as determined by the architect must have existed prior to the Act of 1862. The deduction is not really legitimate, for the tribunal also find that in the case of buildings so erected since the Act of 1862 as to which no consent or refusal of consent was proved the proper consent ought to be presumed. Assuming, however, the validity of the deduction, it was further contended that buildings erected prior to the Act of 1862 were only unlawful if erected on new foundations, and that the onus of proving

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that any building was so erected lay upon the appellants, who had failed to discharge it if, as was conceded, the old maps referred to in the case could not properly be admitted in evidence. It is to be observed that this argument is quite inconsistent with the view taken by Lush J. and the Court of Appeal. Moreover, it is open to the following criticism. There can, I think, be no question of onus probandi where there is no issue joined inter partes. Further, as I have already said, there is, apart from the old maps, ample evidence from which the tribunal of appeal might draw the inference which they have in fact drawn, that the bulk of the buildings erected beyond the line determined by the architect occupy sites which at the date of the Act of 29 Geo. 2, were free of buildings altogether. This building or that building may possibly have been erected on old foundations, but for the question which the architect or the tribunal of appeal had to decide it was only necessary to determine that the bulk of the buildings were not so erected, and of this there was, in my opinion, ample evidence.

I think, therefore, that the appeal succeeds.

LORD SUMNER. My Lords, I agree. This appeal is concerned with the general line of buildings on the north side of the Euston Road, from No. 298 to No. 404 inclusive, over a front of about 290 yards, containing about fifty-two buildings. The tribunal of appeal find as a fact that these buildings have a general line along the inner edge of the pavement. They find also that behind these buildings there are others which conform to a general line, most of which are forty-eight feet to fifty feet from the pavement and some slightly further from it, and that this line of buildings has been in existence for many years. There was evidence to support both of these findings of fact, apart from the issues of Horwood's map of London of 1793 and 1819, which the Court of Appeal rejected as not being evidence, a decision not challenged before your Lordships. Between these two general lines of building physically existent, the tribunal of appeal elected in favour of the latter on grounds of law, which I understand them to submit to the decision of the High Court in the case stated.

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The Euston Road has always been governed by statute. It was made under 29 Geo. 2, c. 88, which by one of its sections required "that no buildings shall be erected on any new foundation by any proprietor or occupier of lands adjacent to the said new road within fifty feet of the said road, and if any such buildings shall be hereafter erected . . . . the same shall be deemed a common nuisance." Subsequent Acts continued these provisions till they were repealed in 1862 by the Metropolis Management Amendment Act. That Act and the London Building Act, 1894, substantially re-enact the building restriction, though they alter the sanction. The general building line adopted by the appellants' superintending architect and affirmed by the tribunal of appeal conforms to this restriction. Further, under the two last Acts the Metropolitan Board of Works and its successor, the London County Council, have had power to consent in writing to the erection of structures beyond the general line of buildings, though not to decide or define what the general line is. That is a matter for the Council's superintending architect, subject to appeal.

The tribunal of appeal held that on the facts as found they were bound in law to disregard all the buildings in front of the older general line of buildings, which conformed to the statutory requirement of a fifty-foot open space on the north side of the road. What the superintending architect had to define in the first instance, and what the tribunal had to establish on appeal, was the "general" line of buildings for the portion of the street in question, not a "uniform" line or a "universal" line. It was to be a line, not a zigzag, and to be general over the whole section of the road dealt with. How much particular irregularity is consistent with a general line, and what features must prevail to establish that line, whether number or size or importance or character of buildings or all or some of these, are questions of fact, and if any questions of law be involved in them they are not raised by this case.

The tribunal took this view of the law, namely, that buildings erected contrary to the law which was in force at the time of their erection ought to be treated as non-existent in point of law for the purpose of fixing a general line of buildings, which, when

established, has important legal results. They so held, though the illegalities were of somewhat varying kinds, and arose, as they found, under somewhat different circumstances. Here lie the questions of law which they raise.

From 1756 to 1862 one thing, and one only, legalized the erection of buildings less than fifty feet from the road, namely, erection on foundations existing before the Act of 1756. There was no evidence before the tribunal that, between the limits above mentioned, any particular building was not erected on foundations older than 1756, and there was on the facts found a possibility that, in the case of any particular building, it might have been erected on such old foundations. This, however, was not material, as the appeal was concerned with a general line, and not directly with the relation of a particular building to that line, though it is true that the question arose from a request by the owners of a particular building to have the general line defined. Of course, the point may be vital in other proceedings against those who, being interested in a particular building, required the architect to define the general line. I think that the tribunal meant to find, and that the evidence warranted them in finding, that buildings erected on foundations older than 1756 could not have been so numerous as to affect the general line, which they found to exist as a matter of fact, and in finding further, by inference, that buildings coming out to the line of the pavement, as to which no valid consent was proved, had been unlawfully erected in so far as concerned the definition of the general line of them.

The tribunal had before them leases, mortgages, and the like, from which they found as a fact, as well they might, that there were nineteen buildings in the section of road in question, which had been erected so as to abut on the pavement before 1862. The present respondents' site was then occupied by such buildings. The tribunal add, "the sites of the buildings or their numbers are distributed throughout the length of the street." I think it must be taken that, in the view of the tribunal, nineteen buildings out of fifty-two would be numerous enough to affect the general building line, unless they were such as should be disregarded on grounds of law. A question of law therefore arises

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here, namely, ought such buildings to be disregarded? and I think that they ought. Although lapse of time may have barred any proceedings against their owners in respect of old buildings now standing by reason of the Summary Jurisdiction Act, 1848, s. 11, or otherwise, although the Act declaring them to be common nuisances has been repealed, although their owners may have defences on various grounds against any proceedings that can now be taken in respect of them, they were, when first erected, unlawful, and their presence within fifty feet of the road has not since been made lawful. Such buildings ought not to have any effect upon a general line of buildings to be lawfully defined.

In the case of nine buildings in this frontage the tribunal had direct evidence of applications for the written consents of the competent authority. Three were granted, the rest were refused, but the tribunal found that "those buildings as to which consents or refusals of consent have been shown are so few in number that the general line of buildings at the inner edge of the pavement would not be affected by their absence." Accordingly I understand that if the remaining forty-three buildings could be shown to be such as ought to be taken account of in law, they would suffice without the nine to make a general line of buildings in fact.

Even assuming that the power to consent to the erection of buildings beyond the general line of buildings in any street, which was given to the Metropolitan Board of Works and afterwards to the London County Council, could be held to apply to the nineteen buildings which are found to have been erected before that power was first given, and even assuming that consent in writing had been proved in each case, though the tribunal does not so find, I am of opinion that the buildings so consented to were rightly disregarded for the purpose of defining the general line of buildings. The Metropolitan Board of Works had power to consent to an erection beyond the general line of buildings, that is, to consent to something exceptional, which left the general line as it was. The Board could not itself fix or decide the general line of buildings, and it could not, by exercising its power to consent to exceptions, effect indirectly that which it could not do directly. To hold otherwise would enable parties, to whom

consent had been refused, to advance their buildings as of right, when a sufficient number of other buildings had been erected under consent, and to erect buildings of any height or character, as proprietors building upon their own land freed from restrictions, though those who had previously built under conditional consents would remain bound by conditions.

This being so, I think it unnecessary to discuss the argument which prevailed with the Court of Appeal. The gist of it was that the events which were proved to have occurred in 1867 evidenced a general consent en bloc to what had already been done, or amounted to conduct which in effect precluded the appellants from treating the respondents as not having received consent at that time. I think that this argument could not place the case higher than it would have stood if actual consent had been given. The point was not argued before your Lordships, and I express no opinion on its merits. All that should be decided with regard to it, in my opinion, is that the case was not so framed as to raise any such question of law. Whether in any given case the requisite consent was given or not is a question of fact, and the case does not find this fact. On the case as stated the question could only be one of law, if the facts necessarily led to the conclusion that the requisite consent had been given, which, I think, no one has contended to be the case.

LORD PARMOOR. My Lords, s. 22 of the London Building Act, 1894, enacts that the general line of buildings shall, if required, be defined by the superintending architect by a certificate to be issued within one month of the date of the application therefor. The appellants, on August 28, 1909, required the superintending architect to define the general line of buildings on the northern side of Euston Road, so far as related to a building which was in course of erection by a tenant of the respondents. On September 28 the superintending architect issued a certificate by which he certified that the general line of buildings on the northern side of Euston Road between Hampstead Road and Osnaburgh Street was as defined by a strong red line on the plan annexed to the certificate and signed by him. This red line falls, not on the inner edge of the pavement, but along the

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line of the fronts of old houses, at a distance of about fifty feet therefrom. The respondents appealed to the tribunal of appeal, which, so far as it affected them, confirmed the definition in the certificate of the superintending architect. The decision of the tribunal of appeal is final on questions of fact, but there is power to submit a case for the opinion of the High Court on any question of law. The question stated for the opinion of the High Court is whether, upon the statement of facts found by the tribunal, the order defining the general line of buildings, so far as it affected the buildings of the respondents, was right in law.

In considering whether the tribunal is right in law it is essential to observe that the definition of the general line of buildings depends not on the position of a particular building, but on the general position of all the buildings which can properly be taken into consideration. To particular buildings exceptional conditions of a special character may attach. In the present case a building may have been erected with the proper consent of the local authority or upon old foundations in existence in 1756, or come within the exemptions contained in s. 22, sub-s. 2, or s. 210 of the Act of 1894. This is not a matter which comes in any way for decision by the superintending architect or the tribunal of appeal. When the general line of buildings has once been defined under the Act there is no power to alter it, so long as the conditions remain unchanged. How far there is a power of alteration, if the conditions are changed, it is not material to consider in the present case, and I desire to reserve my opinion. No general line of buildings on the part of the Euston Road between Hampstead Road and Osnaburgh Street had previously been defined under the certificate of the superintending architect or of the tribunal of appeal. The whole question was open to be decided for the first time on the conditions existing in August, 1909.

In their considered judgment the tribunal state that if their duty consisted in merely defining the general line of building between Hampstead Road and Osnaburgh Street, taking into consideration the whole of the buildings which now exist, they could come to no other decision than that the general line of

buildings is the inner edge of the pavement, but that they considered themselves bound as a matter of law to treat as non-existent (1.) buildings erected by consent of the proper authority which would have been unlawfully there unless so erected; (2.) buildings not lawfully there, which are of two classes, (*a*) buildings for which consent was necessary but for which no consent was obtained, and (*b*) buildings erected in defiance of the law, and to the erection of which no authority had power to consent. In reference to buildings erected by consent or for which consent was necessary, but for which no consent was obtained, the tribunal held that they were so few in number that the general line of buildings would not be affected by their absence. If these had been the only buildings to be treated as non-existent, I understand, from the statement of the case, that the tribunal would have decided that the general line of buildings was along the inner edge of the pavement.

The tribunal, however, state that the question really depends on whether they are to consider as non-existent the bulk of the buildings abutting on the pavement as to which there is no direct evidence of consent or refusal. Mr. Macmorran argued that such buildings should be assumed to have been lawfully erected on old foundations unless the contrary was proved. I do not think that there is any such assumption. It is the duty of the superintending architect, or the tribunal of appeal, to give their decision on a consideration of all the evidence properly brought before them and, if necessary, after a view of the site. Mr. Macmorran further argued that the only proof which told against the contention of the respondents was contained in two old maps not admissible as evidence. I do not doubt that these maps are not admissible as evidence. This was conceded by the counsel for the appellants. Apart, however, from the two maps, there was, in my opinion, evidence before the tribunal of appeal that the buildings on old foundations were so few, and occupied such a small frontage, that they did not affect the general line of buildings, and could in that respect be disregarded. Mr. Macmorran did not contend that buildings which had been unlawfully erected ought to be considered in defining the general building line. Without assenting

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to so wide a proposition as applicable in all cases, I agree that buildings not erected on old foundations were, in the present case, properly disregarded by the tribunal of appeal.

The street in question, Euston Road, was laid out in the year 1756, under the Act of 29 Geo. 2, c. 88. Under this Act there was a prohibition of the erection of buildings on any new foundations within fifty feet of the street. It is not possible to say to what extent buildings on old foundations existed within fifty feet of the street in 1756, but I agree in the argument of Mr. Upjohn that the terms of the Act are inconsistent with the existence of such a continuous line of houses within the fifty feet limit as would constitute a general line of buildings.

Apart from the provision of the Act of 1756, various leases, conveyances, and mortgages were put in at the hearing before the tribunal of appeal. These documents, and the plans attached to them, showed that in the case of Nos. 326 to 334 inclusive, 352 to 364 inclusive, and 398, there were buildings abutting on the pavement in the year 1851, and that in the case of Nos. 378 to 388 there were buildings abutting on the pavement in the year 1862. Whatever weight the tribunal of appeal attached to these documents, they appear to fall far short of establishing the proposition that so many of the buildings now fronting on the pavement had been erected on foundations existing in 1756 as to form a general line of buildings. In addition the tribunal of appeal visited the site. I cannot say that there was no evidence on which it was competent for the tribunal of appeal to confirm the definition of the superintending architect.

The judgment of the Court of Appeal places great weight on a report and plan, dated May 9, 1867, of the then superintending architect, Mr. Vulliamy. This report and plan, and certain correspondence and minutes relating thereto, were put in by the respondents, who contended that they constituted a decision as to the general line of buildings. In my opinion the plan and report were not intended to be, and were not, a decision as to the general line of buildings. It is said, however, that it is not competent for the London County Council now to disregard that which was authorized and approved by the responsible local authorities as they then existed. It is a sufficient answer to say

that the local authorities had no power to approve a general line of buildings, and that the duty of definition has been placed, not with them, but with an independent statutory officer.

With great respect for the judgment in the Court of Appeal I am unable to appreciate the argument that any action of the local authorities in 1867 can fetter the jurisdiction of the superintending architect, or of the tribunal of appeal, in the definition of a general line of buildings not previously defined by a certificate under the Acts of 1862 or 1894. There is a clear distinction between the definition of a general line of buildings and proceedings for a penalty against a particular owner. Whether buildings erected since 1862 have been properly authorized by the responsible local authorities may be of importance if proceedings for a penalty are instituted against the owner of such buildings. It is not in any way relevant to this appeal. The only matter which came before the tribunal of appeal, and which they were competent to entertain, was the definition of the general line of buildings, and in exercising their powers of definition it is the duty of the tribunal to act on their own judgment and independently of any action of the local authorities.

I think it unnecessary to consider the cases of *Scott* v. *Carritt* (1) and *London County Council* v. *Metropolitan Ry. Co.* (2), since I agree with the Court of Appeal that they are distinguishable from the present case.

My Lords, in my opinion the appeal should be allowed.

LORD WRENBURY. My Lords, the Act of 1756 (29 Geo. 2, c. 88), under which the Euston Road was laid out, forbade buildings on new foundations within fifty feet of the road, and enacted that if any such buildings should be erected they should be deemed common nuisances. This Act was continued by subsequent Acts down to an Act of 7 Geo. 4, c. cxlii. The above provision was repeated in s. 140 of the last-mentioned Act, and continued in force until the year 1862, when that section was repealed, as presently mentioned. The tribunal of appeal, who are the judges of fact, have found that there is now, and has been

(1) 82 L. T. 67. (2) [1909] 2 K. B. 317; [1911] A. C. 1.

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in existence for many years, a more or less continuous line of buildings, situate most of them about forty-eight to fifty feet from the pavement, and some at a slightly greater distance between the points C and D, within which limits are situate the premises in question in this case. These are no doubt buildings, or the successors of buildings, erected many years ago in compliance with the provisions of the Act of 1756. If there were nothing more this would no doubt be the general line of buildings. The superintending architect laid down and the tribunal of appeal affirmed this as the general line of buildings. It is the red line on the plan annexed to the judgment of the tribunal. But there is something more. The question of law is, briefly, whether that something ought to be disregarded or not. The additional facts are that, under the circumstances detailed in the judgment of the tribunal, other buildings have been erected on the forecourts of the above-mentioned buildings, and the tribunal find that—

"If our duty consisted in merely defining the general line of buildings between Hampstead Road and Osnaburgh Street, taking into consideration the whole of the buildings which now exist, we could come to no other decision than that the general line of buildings is the inner edge of the pavement."

These further buildings may be divided into four classes:

(1.) Buildings erected by consent of the proper authority:

(2.) buildings erected without the consent and notwithstanding the refusal of the proper authority;

(3.) buildings erected on new foundations when there was no power of consent, and which were wholly unlawful, and were under the Act common nuisances; and

(4.) buildings on old foundations which were lawful.

My Lords, in 1855 a certain power of consent was first given by s. 143 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120). But inasmuch as the statutory veto in the Act of 1756, as continued by subsequent Acts, still remained, the Act of 1855 did not create any power of consent applicable to this road. In 1862 s. 75 of the Metropolis Management Amendment Act, 1862, repealed s. 140 of 7 Geo. 4, c. cxlii., and gave the Metropolitan Board of Works power to consent to the erection of buildings

such as were in fact erected upon the forecourts in the Euston Road. Sect. 75 of the Act of 1862 was repealed by the London Building Act, 1894 (57 & 58 Vict. c. 213), but its provisions are in substance re-enacted by s. 22 of the Act of 1894, the London County Council being substituted for the Metropolitan Board of Works. The result is that in 1862 there arose, and there has since existed, a power in the proper authority to consent to such buildings as are here in question.

The point of law is whether in this state of things the existence of buildings of the first three classes above mentioned is to be regarded in determining the general line of buildings. The fourth class (if there be any such buildings) can certainly be regarded. No one says the contrary. As to this class the only question is whether any such buildings exist. That is question of fact which is not for the Court but for the tribunal of appeal.

The tribunal of appeal disregarded the existence of the first three classes and found such a line as that their decision involves as question of fact that the fourth class does not exist, or at any rate does not exist to a number sufficient to affect the general line of buildings. The Divisional Court held that the tribunal of appeal was right. The Court of Appeal held that it was wrong.

My Lords, I am able to state in very few words my reasons for thinking that the tribunal of appeal was right.

Buildings erected at a time when there was power to give consent as to which consent was asked and was refused cannot stand in a better position than buildings as to which consent was asked and granted. The first two classes may therefore be taken together. Where consent was asked, the proper authority had statutory authority to impose terms and conditions (see s. 75 of the Act of 1862 and s. 26 of the Act of 1894). If the effect of the erection of conditional buildings was to advance the building line, the result would be to discharge the conditions. For the building owner may within the building line erect such a building (unexceptional in other respects) as he thinks proper. If the condition limited him to a one-storey building, he would by the advance of the building line be entitled to erect say a four-storey building. Such a construction of the legislative

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enactments reduces the power of imposing conditions to a nullity.

The effect of the legislation is that the consent of the proper authority leaves the building line where it was but allows the building owner to erect a building in advance of it. This was, in fact, the decision of your Lordships' House in *Fleming* v. *London County Council*. (1) The position may be said to be analogous to that of a licence under a patent. The licence affirms the validity of the patent and owes its existence to the patent. So the building with consent affirms the building line to be in a certain position and derives from the consent the right to exist in advance of it.

My Lords, in the present case the buildings proved to have been erected with consent are few, and the tribunal found that the general line of buildings at the inner edge of the pavement would not be affected by their absence. They added, however, that buildings erected after the Act of 1855 (meaning presumably 1862) must be presumed to have been erected by consent unless they were erected on old foundations. The point, therefore, is in this view of the case important. For the reasons which I have given the tribunal were, I think, right in disregarding these.

The result as regards the third class of buildings, namely, those whose erection was wholly unlawful, seems to me plain. If there be a general building line determined by the existence of buildings in fact, or if there be a building line fixed by statute, as was here the case under the Act of 1756, a building owner cannot of his own mere motion advance it. If, in defiance of the law, he builds where he has no right to build, his act can have no legal effect whatever.

The building line is not a line whose position can be arbitrarily fixed by any one. It is the general line of buildings in the street. The question of fact as to where this line lies is by statute committed to the superintending architect and the tribunal of appeal. They, however, cannot fix an arbitrary line. They can but determine where in fact the line lies. Their act is evidential, not constructive. On the other hand, the Metropolitan Board of Works or the London County Council cannot determine it at all.

(1) [1911] A. C. 1.

In these propositions lies the answer to any contention raised upon what took place in 1867.

After the decision in *Bauman* v. *Vestry of St. Pancras* (1), the Metropolitan Board of Works in 1867 passed a resolution approving a line ten to eleven feet back from the outer edge of the kerb to the foot pavement. If that was the general line of buildings, it was not for them to determine that it was so. If it was not, they had no power to make it so.

The respondents do not rely on the memorial or order of 1867. It would seem that it was the appellants who put in these documents with a view to an argument that the order amounted to a general consent by way of anticipation to any buildings that might thereafter be erected up to that line, and that under the decision in *Fleming* v. *London County Council* (2) the erection of buildings by consent left the building line unaffected.

My Lords, the Metropolitan Board had, in my opinion, no power to give a general consent by way of anticipation. To say that they could do so is equivalent to saying that they could of their own mere motion create a new building line. They have no such power. The building line is, as I have said, a line to be ascertained as matter of fact by the tribunal named for that purpose in the statute.

My Lords, there remains only a question which has been much urged before us, and that is whether as matter of fact the buildings which the tribunal have disregarded as unlawful are unlawful buildings. It is said that there was no evidence upon which the tribunal could so find, and that as matter of law the Court ought to hold that they were lawful.

In the first place, this contention rests upon the assumption that the onus of proof was on some one and that in the absence of proof a certain result must ensue. I doubt whether there was any onus of proof on any one. The tribunal has to find out as best it can, upon such materials as are available, where the general line of buildings is. The onus is no more on the one side than on the other of the parties before it.

In the second place, I submit to your Lordships' House that the starting point is the existence in 1756 of a piece of ground

(1) L. R. 2 Q. B. 528. (2) [1911] A. C. 1.

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upon which except under circumstances no building is to be placed. If the onus is on any one it is upon the person who affirms that a building which is now there is entitled to be there. It is no doubt true that upon an indictment of any particular owner the prosecutor would have to prove that the building was on new foundations, but the question here is not whether any particular building is on new foundations, but whether there are such a number of buildings on old foundations as that they present a general line of building. From the contents of the Act of 1756 I agree that the respondents are entitled to say that for laying out the new road the destruction of some buildings was required, but I am not prepared to infer from this that in 1756 there was a row of old foundations along the side of a road then non-existent, but to be laid out, coinciding with the foundations of the successive shops which are now found there.

My Lords, the suggestion is to my mind extravagant. The tribunal were entitled, I think, to draw inferences, and had I been, which I am not, a person to ascertain the facts, I should certainly infer that such a line of old foundations did not exist. Upon the materials properly before them the tribunal, as judges of fact, were, I think, entitled to find, as they have found, that the buildings in advance of the old buildings ought to be disregarded.

For these reasons I think that this appeal succeeds.

EARL LOREBURN. My Lords, there has been a good deal of detail in this case, but the relevant facts are few.

The superintending architect certified or defined a building line in regard to a portion of the Euston Road, marked C to D on a plan which was before us. The tribunal of appeal affirmed this part of the certificate, but the Court of Appeal overruled the decision on grounds of law, possessing indeed, as your Lordships possess, no power to disturb what has been decided by the tribunal on other than legal ground. I will state concisely how the points of law arise.

Euston Road was constructed under an Act of 1756, which provided that no building could be erected within fifty feet of it on new foundations. In 1855 some change was made, but not

in any sense that affects this case. In 1862 the Act of that year prohibited buildings being erected in front of the general line when less than fifty feet from the highway, or within fifty feet of the highway when the general line was more than fifty feet from it, without written consent of the Board. This provision, though repealed in 1894, was in effect re-enacted. That is all I need say about these Acts. It follows that from 1756 onwards no building could be erected in this part of Euston Road on new foundations nearer to the highway than fifty feet without consent.

That being so, when the tribunal of appeal went to inspect this part of the Euston Road (C—D on the plan) they found that there is, and has long been, a more or less continuous line of buildings about fifty feet from the pavement, and also a row of buildings of considerable age between that line and the pavement for the whole length of the frontage. In short, the space between the continuous line and the street had been built over, some of the structures being of one storey, some of two or more. What were they to define as the general line of buildings in these circumstances?

They say, in the special case, that if they were to take into consideration the whole of the buildings, they would decide that the general line of buildings is the inner edge of the pavement. But they also held in law that they must treat as not existing any buildings erected by consent of the lawful authority and any buildings that were unlawfully erected. Accordingly they defined the line at the back, where the more or less continuous line of old buildings ran, as already stated. In short, they took the back line some fifty feet from the pavement and rejected the pavement line, upon the ground that the intermediate buildings ought to be disregarded, being there either by consent of the lawful authority or being there unlawfully.

Now the tribunal of appeal are the sole judges of fact, and their conclusions from the facts are binding upon a Court of law provided there were materials upon which they could in reason come to those conclusions, and provided there was no error in law.

It is unnecessary to consider such of the intermediate buildings as were erected by consent because we are told in the special

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case they are so few in number that the general line of buildings at the inner edge of the pavement would not be affected by their absence, to say nothing of the decision of this House in *Fleming's Case* (1) which lays down that consent buildings are to be disregarded for such a purpose.

Accordingly two points of law emerge for decision by your Lordships.

In the first place an argument was advanced by the respondents that in defining the general building line the tribunal was in law wrong in disregarding buildings which had been unlawfully erected, at all events after they had been allowed to stand for many years. It would be strange if this were so. It would mean that if a sufficient number of owners had defied the law and built upon their forecourts right up to the street, all other owners would be free to defy the law and do the same, though if the earlier buildings up to the street had been erected with consent of the proper authority the other owners would not be free to defy the law. And all this in the teeth of an Act of Parliament directly forbidding such building without the proper consent. The mere statement of such a contention carries its own refutation. And I do not think it could ever have been entertained but for some confusion of reasoning. It is one thing to say that when unlawful buildings have been allowed to stand for a certain time and to be the subject of purchase and sale they ought not to be demolished. It is quite another thing to say that they ought to be treated as standing arguments to justify a still further disobedience of the statute, as would be the case if they were reckoned in the definition of a building line. I have, therefore, no doubt at all that the tribunal was perfectly right to disregard unlawful buildings as they did.

In the second place Mr. Macmorran pressed upon the House the view that there was no evidence before the tribunal to support their finding that substantially all the buildings abutting on the pavement were erected on new foundations—new, that is, since 1756. I cannot accept that contention. The tribunal, in cases of this kind, see the houses, examine the buildings, and hear evidence. They had before them the Act under which this road

(1) [1911] A. C. 1.

was laid out more than 150 years ago with its provisions against building within fifty feet. No one would suppose from this Act that a line of buildings already existed right up to the road. They examined various leases, conveyances, and mortgages of the buildings, and none of them showed any old buildings up to the pavement further back than 1851. Also there was a correspondence and a report of the surveying architect with a plan in 1867, from which I infer that a number of house owners in this road, including the predecessor in title of one of the now respondents, negotiated with the Metropolitan Board of Works upon the footing that the Board's consent might be needed to legalize building in front of the back line. Why did they do that if there were old foundations as now suggested? Also no one seems to have proved, or offered to prove, in regard to the length of road now in question, that there were, in fact, any foundations prior to 1756 in front of that back line. Why not, if there were any? I proceed no further, for this is, in my judgment, quite sufficient evidence—having regard to the character and functions of the tribunal I would rather say quite sufficient material—to support their conclusion. They had to define a general line. It is not like a precise issue in a litigation between one man and another. I do not see how the burden of proof, which in suits between adverse parties is so often disputed, and was introduced into the argument here, can apply at all to an inquiry of this kind. I do not rely upon two old maps which were before the tribunal, and were not authenticated in a legal way, for both sides seemed in argument to agree that they were inadmissible on such an inquiry. I prefer to reserve my opinion upon that point. But quite apart from them there is, in my view, more than enough to support the decision of the tribunal, who alone have jurisdiction to determine questions of fact. I must say that I believe they were quite right in their decision. I, too, disbelieve in these old foundations, but my view adds nothing to theirs.

This involves a dissent from the order of the Court of Appeal, which must always make me hesitate. The point on which the Court of Appeal most relied was that in 1867 the Metropolitan Board of Works and the vestry invited owners to build up to the

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pavement line, and that the owners by doing so in fact altered the general line as a result of their building. I think that the Board had no power to issue such an invitation or to deprive either their successors or any other authority of the statutory right to refuse consent for such buildings or to affix conditions to such consent. And even if they had such power, or if some kind of estoppel could arise from what they did, surely it could not arise except in favour of such persons (or their successors) as acted upon the supposed invitation. I cannot see how building on such an invitation can create a building line at the pavement when the Act says that building shall not be within fifty feet of it except by consent, and this House has said that building by consent does not affect the building line at all.

I will only add that nothing which I have said is meant to countenance any claim to remove buildings in past time erected without interference though unlawfully. That is quite a different matter. In my opinion the appeal should be allowed, and the order of the tribunal restored.

Order of the Court of Appeal reversed and order of the King's Bench Division restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, June 11, 1915.

Solicitor for appellants: *Edward Tanner.*
Solicitors for respondents: *Dalston, Sons & Elliman.*

[HOUSE OF LORDS.]

CENTRAL ARGENTINE RAILWAY, LIMITED APPELLANTS; H. L. (E.)*

AND 1915

MARWOOD . . . . . RESPONDENT. *June* 14.

Ship—Charterparty—Demurrage—Strike Clause—Construction.

A steamer was chartered to carry a cargo of coal by charterers who were also consignees of the cargo to a specified port under a charter-party which provided that the cargo should be taken from alongside by consignees at port of discharge, free of expense and risk to the steamer, at the average rate of 200 tons per day, weather permitting, Sundays and holidays excepted, provided steamer could deliver at that rate; if longer detained consignees to pay demurrage at the rate of fourpence per ton per running day. "Time to commence when steamer is ready to unload and written notice given, whether in berth or not. In case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevents or delays the discharging, such time is not to count, unless the steamer is already in demurrage."

On the arrival of the steamer at the port of discharge she gave notice of readiness to discharge, but all the berths at the port were occupied and there was at the time a strike of stokers at the port. For the first fortnight after her arrival no work of discharging was done at all, but for the next ensuing nineteen days, after which period the strike came to an end, there was a partial resumption of work, and there were discharged from the other ships in the port 6000 tons of coal, which was equal to six days' normal work. The steamer was unable to get into berth until after the termination of the strike owing to the delay in discharging the other ships by reason of the strike.

Upon a claim for demurrage by the shipowner:—

Held, that "such time" meant the time for which the discharging was actually prevented or delayed by the strike and that the shipowner was entitled to count the six days as lay days.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing a judgment of Pickford J.

The action was brought by the respondent (hereinafter called the plaintiff) as managing owner and part owner of the steamship *Goathland* on behalf of himself and his co-owners against

* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

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the appellants (hereinafter called the defendants) to recover the sum of 238*l.* 8*s.* 1*d.* for demurrage of the *Goathland* in discharging a cargo of coals at Villa Constitucion.

The action was tried without pleadings on an agreed statement of facts.

The *Goathland* was chartered under a charterparty dated November 11, 1911, to carry a cargo of coals from Barry Dock to Villa Constitucion.

The defendants were the charterers and also the receivers of the cargo carried in the *Goathland*.

Clause 3 of the charterparty provided that the cargo should be loaded in 140 running hours and it then proceeded: "Any time lost through riots, strikes, lock-outs or any dispute between masters and men occasioning a stoppage of pitmen, trimmers or other hands connected with the working or delivery of the coal for which the steamer is stemmed . . . . or any cause beyond the control of the charterers not to be computed as part of the loading time (unless any cargo be actually loaded during such time)."

Clause 8 was as follows:—

"8. The cargo to be taken from alongside by consignees at port of discharge, free of expense and risk to the steamer, at the average rate of 200 tons per day, weather permitting, Sundays and holidays excepted, provided steamer can deliver it at this rate; if longer detained consignees to pay steamer demurrage at the rate of fourpence per net register ton per running day (or pro rata for part thereof). Time to commence when steamer is ready to unload and written notice given, whether in berth or not. In case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevents or delays the discharging, such time is not to count, unless the steamer is already on demurrage. Consignees to effect the discharge of the cargo, steamer paying one shilling per ton of 20 cwt., or 1015 kilos, and providing only steam, steam-winches, winchmen, gins, and falls."

The *Goathland* carried 4169 tons of cargo on the voyage in question. On a calculation of the time allowed by charterparty

the vessel had 20 days 20 hours for discharging subject to the exceptions specified in the charterparty.

The *Goathland* arrived at Villa Constitucion and notice of readiness to discharge was given at 4.30 P.M. on Friday, January 12, 1912, and she was then ready to discharge.

At the time of the arrival of the *Goathland* at Villa Constitucion there was a strike of railway engine drivers and stokers in existence at the port, which strike began on January 6, 1912.

The strike continued until February 15, 1912, on which day it officially terminated under a decree of the Government of the Argentine Republic. No work of discharging coal-laden steamers took place in the port from the date of the *Goathland's* arrival until January 27, 1912, and it was admitted by the plaintiff that the work of discharging coal-laden steamers in the port was impossible during that time owing to the strike.

Between January 27, 1912 (when there was a partial resumption of the work of discharging), and February 15, 1912, there were discharged from the various steamers in the port 6269 tons of coal, which was equal to $6\frac{1}{4}$ normal days' work. This work the defendants were able to do in spite of the strike, but the defendants were prevented by the strike from discharging any further quantity of coal between those dates.

Under ordinary circumstances the discharge of coal from all steamers in the port of Villa Constitucion was 1000 tons per day, there being four berths in the port at which discharging could take place, and the normal amount discharged being 250 tons for each steamer. The 6269 tons were all discharged from steamers occupying these four berths and these steamers were all delayed by the strike and not by any congestion or unusual number of steamers arriving at Villa Constitucion.

The *Goathland* did not get into berth until 11.30 A.M. on Friday, March 1, 1912, and she did not complete her discharge until 10 A.M. of Saturday, March 23, 1912.

The defendants admitted, although work was not fully resumed on February 16, 1912, or for some time thereafter, that the steamer's lay time began to count as and from midnight of February 15, 1912, and calculating on this basis (excluding Sundays and holidays) they admitted 30 days and 10 hours as

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having been occupied up to the time of the discharge of the cargo, and they admitted and had paid to the plaintiff 9 days and 14 hours' demurrage.

The dispute between the parties related solely to the period between January 27, 1912, and February 15, 1912, both days inclusive. During this time the *Goathland* was, though ready to discharge, not in berth and could not be berthed or discharged because the four berths were occupied by other steamers which had arrived at Villa Constitucion before the *Goathland*, and which had been delayed in discharging and remained occupying those berths by reason of the strike.

The plaintiff claimed that he was entitled to count 6¼ days during the said period, whilst the defendants contended that he was not entitled to count anything in respect of the said time.

Assuming that the plaintiff's contention was correct, then the vessel's discharging time of 20 days 20 hours expired at 2 P.M. of March 6, 1912, and 16 days 20 hours' demurrage was due, against which the defendants had paid 9 days 14 hours, leaving still due 7 days 6 hours amounting to 238*l.* 8*s.* 1*d.*

Assuming that the defendants' contention was correct, then the plaintiff had been paid the whole of the demurrage due to him.

Pickford J. gave judgment for the defendants, but his judgment was reversed by the Court of Appeal by a majority (Lord Reading C.J. and Lush J., Phillimore L.J. dissenting).

May 14, 17. *Sir R. Finlay, K.C.*, and *Leck, K.C.* (with them *A. M. Bremner*), for the appellants. The *Goathland* was prevented by reason of the strike from discharging during the whole period from January 27 to February 15, 1912. The effective cause which prevented her discharge was the strike, and it was owing to the strike that there was no berth available for the discharge of the ship till February 15.

Adair Roche, K.C., and *Norman Raeburn*, for the respondent. *London and Northern Steamship Co.* v. *Central Argentine Railway* (1)—a decision on this clause—shows that "such time" in clause 8 means the time during which the strike prevents or

(1) (1913) 108 L. T. 527.

delays the discharge. The period of 6¼ days was not a period of delay but of progress for the *Goathland* and for the vessels in front of her, and it was properly computed as part of the lay time of the *Goathland*. There is no admission that the ship could have got into berth on January 12 apart from the strike, and the time is to run whether the ship is berthed or not.

Leck, K.C., replied.

The House took time for consideration.

June 14. LORD PARKER OF WADDINGTON. (1) My Lords, the first question your Lordships have to determine in this case concerns the construction of clause 8 of the charterparty of November 11, 1911, whereby the appellants chartered the *Goathland* to carry a cargo of coals from Barry Docks to Villa Constitucion, the appellants being themselves the receivers of the cargo at the port of discharge. The eighth clause provides that the cargo is to be taken from alongside by the consignees at the port of discharge free of expense and risk to the steamer at the average rate of 200 tons per day, weather permitting, Sundays and holidays excepted, provided the steamer can deliver at this rate. If the steamer be longer detained, the consignees are to pay demurrage at the rate therein specified. Time is to commence when the steamer is ready to unload and written notice given, whether in berth or not. Then came the words, "in case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevents or delays the discharging, such time is not to count unless the steamer is already on demurrage." This clause cannot be said to be happily framed. There is no antecedent to which "such time" can be referred so as to give any reasonable meaning to the words. It appears to me, therefore, that "such time" must mean either (1.) the time during which any of the matters enumerated is operating to prevent or delay the discharge of the steamer, or (2.) the time for which the discharging is actually prevented or delayed. The appellants contend that the former construction is the true one. Scrutton J. decided in

(1) Read by Lord Sumner.

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an action of *London and Northern Steamship Co.* v. *Central Argentine Railway* (1) in favour of the latter construction, and the Court of Appeal have adopted the same view. In my opinion the Court of Appeal were right. If the former construction were adopted, it might lead to anomalous results. Suppose, for example, that, notwithstanding a delay caused by a strike, the consignees succeeded in discharging 90 per cent. of the cargo. In such a case the lay days would not have commenced to run at all, and the consignees would have the whole of them to discharge the remaining 10 per cent. of the cargo, and might be as dilatory as they chose during this period. The latter construction is open to no such criticism. According to it, only the time lost would be excluded from the computation of the lay days, a perfectly reasonable arrangement, fair to both parties. A charterparty is a business document and must be construed, at any rate where its terms are ambiguous, with some regard to business principles. It cannot, I think, be inferred from the third clause of the charterparty, where the expression "the time lost" is actually used, that the parties must have meant something different by "such time," as used in clause 8. A charterparty is not generally prepared with meticulous attention to consistency in the use of language. It may well embody clauses taken from a variety of precedents and found by experience to be sufficient for working purposes.

My Lords, the second question for decision arises in the following manner. The *Goathland* arrived at its port of destination on January 12, 1912, and on the same day at 4.30 P.M. gave notice that she was ready to discharge. At this time there was a strike of railway engine drivers and stokers in existence at the port, and between January 12 and January 27, 1912, no work of discharging coal-laden steamers took place, such work being rendered impossible by reason of the strike. The respondent admits that the whole of this period is excluded by virtue of clause 8 in the computation of the lay days. On January 27 work at the port was partially resumed, and between that date and February 15, 1912, when the strike ended, 6269 tons of coal were discharged from four steamers which had arrived in the port prior to the

(1) 108 L. T. 527.

Goathland and occupied the only available berths. The normal discharging capacity of the port is 1000 tons a day, 250 tons per vessel; the 6269 tons discharged between January 27 and February 15 represent, therefore, 6¼ normal days' working. It follows that the delay due to the strike during this latter period is the difference between the whole period and 6¼ days. The respondent admits that this difference ought to be excluded by virtue of clause 8 in computing the lay days. The appellants contend that the 6¼ days ought similarly to be excluded. This is the only dispute between the parties.

My Lords, the appellants base this contention on the following reasoning. It is admitted, they say, that the *Goathland* could not get a berth because all the berths were occupied by the other four vessels. It is further admitted that between January 27 and February 15, 1912, these vessels had been delayed in discharging and remained occupying the four berths because of the strike. Therefore it was because of the strike that the *Goathland* could not get to berth.

If your Lordships be of opinion that the construction of clause 8 for which the appellants contended is the true construction, this reasoning is obviously correct. But if "such time" in clause 8 means the time lost by reason of the strike, the reasoning is, in my opinion, fallacious. On this construction the only question is whether the 6¼ days is time lost by reason of the strike, and to state the question in this way is, in fact, to answer it. The 6¼ days represent, in fact, time gained, notwithstanding the strike, during every moment of which the difficulty in the way of the berthing of the *Goathland* was being removed. It appears to me that the appellants, having already had all the benefit to which they are entitled under clause 8 by the exclusion in the computation of the lay days of all time lost by reason of the strike, are endeavouring, to the extent of 6¼ days, to secure that benefit a second time, and that the syllogism on which they base their contention pays less regard to the substance of the matter than to the verbal expressions contained in the agreed statement of facts. It must be remembered that according to the express terms of the charterparty the lay days commence to run whether the vessel is or is not berthed. It follows that the mere fact of

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the four available berths being already occupied when the vessel arrives is no reason for excluding any period of time from the computation of the lay days. Any hardship on the charterers in this respect is probably intended to be obviated by the fact that the lay days are calculated with reference to an average discharge of 200 tons per day only, though the normal rate of discharge at the port is 250 tons a day. The period of delay due to the occupancy of the four berths would in any case be counted in reckoning the lay days, and there is nothing in the statement of facts to show that this period was increased by reason of the strike beyond the period which the respondent has already allowed between January 12 and February 15. We are not told when the four vessels respectively went into berth or what was the tonnage of their respective cargoes.

In my opinion, therefore, the appeal should be dismissed with costs, and I move accordingly.

LORD SUMNER. My Lords, I think that clause 8 of this charterparty was rightly construed in *London and Northern Steamship Co.* v. *Central Argentine Railway.* (1) Its effect is thus stated by Pickford J. in the present case, "for so much time as the discharging is prevented or delayed by the excepted causes, for so much time an allowance is to be made out of the lay days." Scrutton J. in the former case and the Court of Appeal in the present one gave illustrations which show how unreasonable the contrary interpretation would be.

The charterparty is in a general form adapted to all sorts of vessels. The clause begins by showing how to calculate the number of lay days to be allowed to the particular ship as her discharging time. Then it states when that time so calculated is to begin; then how and when it may be suspended. In my opinion "such time" means the discharging time of the ship in question, and it is to be suspended and is not to count in case of strikes preventing or delaying the discharging of the ship. Sundays and holidays, which as such are not to count in the computation of lay days, are separately excepted. Strike time is only excepted when the strike delays the ship in

(1) 108 L. T. 527.

question, not when it simply occurs or even simply delays other ships.

The suggestion was made that the parties meant to suspend discharging time in the bare event of a strike operating upon the discharge of shipping generally, because in some ports the actual effect of strikes on a particular ship is so uncertain as to be unascertainable at any rate with precision. If so the clause involves the ship's unconditional surrender to the charterer, merely in order to avoid putting him to the expense of proving his right to come within the exemption, a stretch of complaisance that I think improbable.

My Lords, I do not construe the agreed statement of facts as warranting the inference drawn at the trial, that "had it not been for the strike the four steamers would have been discharged and the berths would have been free, and therefore the *Goathland* would have been discharged in ordinary course." I think that the statement is consistent and is meant to be consistent with the arrival of some or all of these vessels so short a time before the *Goathland's* arrival that considerable delay, or even delay as long as that now in question, might have happened to her in ordinary course.

Be this as it may, I do not think the charterers can succeed. It is to be remembered that when notice of readiness has been given, the ship being then ready to unload, the shipowner's part is done and the risk of delay, including the risk of want of a berth, falls on the charterer, subject to his right to bring himself within the strike clause in question if he can. The words are express, "whether in berth or not." I think the words "which prevents or delays the discharging" mean strikes which in themselves prevent or delay the discharging of the chartered ship herself, and do not extend to the case of strikes which only prevent the chartered ship from getting into a berth because they prevent some other ship from getting out of that berth. Further, the *Goathland* was not delayed by the fact that partial discharging went on during the seventy-five hours in question, but by the total absence of any discharging during the earlier days. The fact that more work was not done during the seventy-five hours may in a sense have delayed her, though even

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so not for the seventy-five hours, but in truth the work actually done during that time advanced instead of delaying her discharging, because pro tanto it brought her nearer to the point at which she could berth and begin her discharge.

I am of opinion that the appeal should be dismissed with costs.

LORD PARMOOR. My Lords, the appellants chartered the steamship *Goathland* to carry a cargo of coals, of which they were the consignees, from Barry Dock to Villa Constitucion. The respondent, as managing owner and part owner of the said steamship, brought an action against the appellants for the sum of 238*l.* 8*s.* 1*d.* for demurrage. The *Goathland* arrived at Villa Constitucion and notice of readiness to discharge was given on January 12, 1912, and she was then ready to discharge. When the *Goathland* arrived at Villa Constitucion, there was a strike of railway engine drivers and stokers, which had begun on January 6 and continued until February 15. Between January 27, when there was a partial resumption of the work of discharging, and February 15 there were discharged from the various steamers in the port 6269 tons of coal, which is equal to $6\frac{1}{4}$ normal days' work. The *Goathland* did not get into berth until Friday, March 1, and did not complete her discharge until Saturday, March 23. The dispute between the parties relates solely to the period between January 27 and February 15. The respondent claims that he is entitled to count $6\frac{1}{4}$ days during the said period, while the appellants contend that the respondent is not entitled to count any days during this period.

The case depends upon the construction of clause 8 of the charterparty. Under this clause the appellants undertook to discharge at the average rate of 200 tons per day, weather permitting, Sundays and holidays excepted, provided the steamer can deliver at this rate. The time commences when the steamer is ready to unload and written notice given, whether in berth or not, so that the risk of finding a vacant berth was on the appellants.

The important words of the clause are as follows: "In case of strikes, lock-outs, civil commotions, or any other causes or

accidents beyond the control of the consignees which prevents or delays the discharging, such time is not to count, unless the steamer is already on demurrage." It was argued on behalf of the appellants that so long as the strike continued the time did not count, and that since the strike did not terminate until February 15, the respondent is not entitled to count any days or parts of days between that date and January 27. I do not think that this is the natural meaning of the words used. "Such time" means time wasted, either by prevention or delay, in discharging a steamer, from strike, lock-out, civil commotion, or any other cause or accident beyond the control of the consignees, and in this respect I agree with the contention of the respondent and the judgment in the Court of Appeal. It necessarily follows that the 6¼ days not wasted during the period between January 27 and February 15 should be counted in the discharging time.

One of the effects of the strike was that the *Goathland* could not be berthed because the four berths at Villa Constitucion were occupied by other steamers which had arrived before the *Goathland*. These steamers had been delayed in discharging and remained occupying the four berths by reason of the strike. In my opinion the occupation of the four berths makes no difference. There was an obligation upon the appellants to discharge, whether or not there were vacant berths, so soon as the *Goathland* was ready to unload and written notice had been given.

My Lords, in my opinion, the appeal fails.

LORD WRENBURY. My Lords, on the question of construction, I am of opinion that the words "such time" mean the time for which the strike prevents or delays the discharging. The time which has commenced is not to count as running during the period over which discharge is prevented or delayed by a strike. The English is not good, but the meaning, I think, is plain.

My Lords, I learn from the agreed statement of facts that during the period from January 27 to February 15 the *Goathland* could not be berthed or discharged, because the four berths were occupied by other steamers, and that those steamers remained occupying the berths by reason of the strike. These statements may be compressed into the single statement that the *Goathland*

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failed to get a berth by reason of the strike. But under the charter time is to commence when steamer ready to unload and notice given whether in berth or not. The charterer took the risk of being unable to get a berth. The *Goathland* was prevented from discharging, not by the strike, but by a consequence of the strike, namely, that the berths were occupied by other vessels longer than they otherwise would have been. From January 12 to January 27 she was also unable to get a berth. She has, however, rightly or wrongly, been allowed this time because there was a strike. She is really seeking to be allowed this time over again. There is nothing to show that if there had been no strike she would have been able to get a berth at once upon arrival on January 12. Neither is there anything to show that if the four ships had arrived just before her, say, on January 11, they would have discharged and left the berths free in time to allow her to escape demurrage. There are not, I think, facts to support the charterer's contention.

I think the appeal fails and must be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 14, 1915.

Solicitors for appellants: *Norton, Rose, Barrington & Co.*
Solicitors for respondent: *Botterell & Roche.*

[HOUSE OF LORDS.]

PORT OF LONDON AUTHORITY . . . . APPELLANTS;

AND

BRITISH OIL AND CAKE MILLS, LIMITED RESPONDENTS.

H. L. (E.)*
1915
June 21.

Docks—Port Rates—Exemption—Goods imported for Transhipment only—"Coastwise"—Conveyance "by sea only"—Port of London Act, 1908 (8 *Edw.* 7, *c.* 68), *s.* 13—*Port of London (Port Rates on Goods) Provisional Order Act*, 1910 (10 *Edw.* 7 *& 1 Geo.* 5, *c. c.*), *Schedule*, *s.* 9

Sect. 13, sub-s. 1, of the Port of London Act, 1908, provides that, subject to the provisions of that section, all goods imported from parts beyond the seas or coastwise into the Port of London, or exported to parts beyond the seas or coastwise from that port shall, subject to any exemptions or rebates contained in a provisional order under the section, be liable to port rates, provided that "the provisional order . . . . shall provide for exempting from such rates goods imported for transhipment only . . . ."

Sect. 13, sub-s. 5: "For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point . . . ."

Sect. 9 of the Provisional Order in the schedule to the Port of London (Port Rates on Goods) Provisional Order Act, 1910, provides that "No port rates shall be charged by the authority on transhipment goods, which expression wherever used in this order means and includes goods imported for transhipment only, ... For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise" which are certified and proved within the period and in the manner provided by the section to have been intended for transhipment and to have been shipped again as soon as practicable within the Port of London for conveyance by sea to such other port.

Goods belonging to the plaintiffs were imported by steamer into the Port of London from beyond the seas, and the plaintiffs delivered to the collector of the Port Authority a certificate under s. 9 of the Provisional Order stating that the goods were intended for transhipment to the port of Rochester, on the river Medway, by sailing craft. Rochester was within the Reculvers line but not within the Port of London. The Port Authority declined to accept the certificate, and the plaintiffs paid the port rates on the goods under protest. The goods

* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

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were put over the side from the steamer into a sailing barge and conveyed to Rochester:—

Held, that these goods were goods imported for transhipment only within the meaning of s. 9 of the Provisional Order and were therefore within the exemption.

Decision of the Court of Appeal [1914] 3 K. B. 1201 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Pickford J. (2)

The action was brought by the respondents to recover the sum of 1*l.* 13*s.* 4*d.* paid by them under protest to the appellants for port dues.

The facts were agreed.

The steamship *Assyria* arrived from Calcutta for discharge at the Victoria Docks in the Port of London on June 12, 1912. Part of the cargo, namely, 100 tons of linseed, belonged to the respondents, who on June 12, 1912, as owners of the goods delivered to the appellants' collector a certificate in the form required by the appellants under the Port of London (Port Rates on Goods) Provisional Order Act, 1910, schedule, s. 9, in respect of goods imported into the Port of London and intended for transhipment and entitled Inwards Port Rates Exemption Certificate. The certificate stated that the goods (which it described) were intended for transhipment, the destination and route being Rochester in the county of Kent and the mode of conveyance by sailing craft belonging to the London and Rochester Barge Company. The appellants declined to accept the certificate and made a note on the certificate as follows: "Inside line which extends from Colne Point to Reculvers." Thereupon the respondents paid under protest the sum of 1*l.* 13*s.* 4*d.*, being the amount claimed by the appellants for foreign inwards port rate on the 100 tons of linseed at the rate of 4*d.* per ton.

The 100 tons of linseed were shipped again at the Victoria Docks by being put overside from the steamship *Assyria* into a sailing barge, and the goods were then conveyed by the barge to the port of Rochester (which was on the river Medway) as soon as practicable after June 12, 1912, namely, on July 2, 1912.

(1) [1914] 3 K. B. 1201. (2) [1914] 1 K. B. 5.

The point in dispute was whether under the circumstances above stated the foreign inwards port rate was legally chargeable in respect of these goods. The question turned upon the construction of s. 13 of the Port of London Act, 1908, and s. 9 of the schedule to the Port of London (Port Rates on Goods) Provisional Order Act, 1910. (1)

Pickford J. held that the goods were entitled to the exemption conferred by the latter section and gave judgment for the respondents, and the Court of Appeal by a majority (Kennedy

(1) Port of London Act, 1908, s. 13, sub-s. 1: "Subject to the provisions of this section, as from such day as may be fixed by the Board of Trade not being more than thirteen weeks after the provisional order embodying the schedule mentioned in subsection 2 of this section has been confirmed by Parliament, all goods imported from parts beyond the seas or coastwise into the Port of London or exported to parts beyond the seas or coastwise from that port shall, subject to any exemptions or rebates which may be contained in a provisional order under this section or allowed by the Port Authority, be liable to such port rates as the Port Authority may fix, not exceeding such rates as may be specified in any provisional order made by the Board of Trade for the time being in force . . . .

"Provided that—

. . . . . .

"(*b*) The provisional order under this section shall provide for exempting from such rates goods imported for transhipment only, or which remain on board the ship in which they were imported for conveyance therein to another port, and may determine what goods are for the purposes of such exemption to be treated as goods imported for transhipment only."

Sub-s. 5: "For the purposes of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point, ..."

Port of London (Port Rates on Goods) Provisional Order Act, 1910, schedule, s. 9: "No port rates shall be charged by the Authority on transhipment goods which expression wherever used in this Order means and includes goods imported for transhipment only and also goods which remain on board the vessel in which they were imported for conveyance therein to another port.

"For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise which are certified and proved within the period and in manner hereinafter provided (1.) to have been intended for transhipment at or before the time of the report of the ship at the Custom House or within seventy-two hours thereafter excluding Sundays and holidays and (2.) to have been shipped again as soon as practicable within the limits of the Port of London for conveyance by sea to such other port. . . . ."

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and Phillimore L.JJ., Buckley L.J. dissenting) affirmed this judgment.

May 10. *Upjohn, K.C.*, and *George Wallace, K.C.* (with them *A. F. Wootten*), for the appellants. The definition of "coastwise" in sub-s. 5 of s. 13 of the Port of London Act, 1908, applies to the whole of the section, which is both a charging and an exempting section, and the object and function of sub-s. 5 was, for the purposes of the section and the provisional order to be made thereunder, to define once and for all the meaning of that word. The Provisional Order was made in pursuance of s. 13, and s. 3 of the Order provides that expressions defined in the Port of London Act, 1908, shall, unless the context otherwise requires, have the same meaning in the Order. "Coastwise" as defined by sub-s. 5 of s. 13 of the Act of 1908 means beyond the Reculvers line, and unless the voyage is beyond that line there is no charge and therefore no exemption. The expression occurs twenty-one times in the Provisional Order, and in twenty instances it is used in respect of charging goods and therefore clearly in the sense of sub-s. 5. In s. 9 of the Order, on the first occasion on which the expression occurs, it bears the same meaning, and it is unreasonable to hold that the expression bears two different meanings in the same section. Looking at the whole Order and its relation to s. 13 of the Act of 1908, the conclusion is that the Order is to be read into the section. Apart from any statutory provision this is not a conveyance by sea or coastwise. This conveyance is entirely within the limits of the river Thames and the river Medway, and a conveyance along a navigable river is not a conveyance by sea: see *Overseers of Woolwich* v. *Robertson*. (1) In the Oxford Dictionary "coast" is defined as "the edge or margin of the land next the sea." That does not extend to the mud flats of the Thames and the Medway. "Coastwise" in the expression "whether beyond the seas or coastwise" in s. 9 of the Order bears the same meaning as in the rest of the Order, and the goods being thus not brought within any exemption the port rate is payable. [They also referred to the Customs

(1) (1881) 6 Q. B. D. 654.

Consolidation Act, 1867, s. 140; *Mersey Docks and Harbour Board* v. *Henderson Brothers* (1); *The Carlotta.* (2)]

Ernest Pollock, K.C., G. J. Talbot, K.C., and *Morton W. Smith,* for the respondents, were not called upon.

The House took time for consideration.

June 21. LORD ATKINSON. My Lords, this is an appeal from an order of the Court of Appeal, dated July 18, 1914, upholding the judgment of Pickford J. (as he then was) pronounced by him in the Commercial Court on October 17, 1913, in favour of the respondents, in an action brought by the latter against the appellants to recover the sum of 1*l.* 13*s.* 4*d.*, money paid under protest for foreign inwards port rates on 100 tons of linseed at 4*d.* per ton.

The facts are undisputed. A ship named the *Assyria* arrived from Calcutta in the Victoria Docks in the Port of London on June 12, 1912, to be there discharged. She had on board 100 tons of linseed consigned to the respondents, who carry on their business at Rochester. This linseed was discharged by putting it over the side of the *Assyria* into a sailing barge. The barge sailed with her cargo down the Thames to the mouth of the river Medway, crossed the imaginary line which marks the northern boundary of the port of Rochester, and proceeded up the river Medway to the place within this port where the goods were delivered to the respondents.

The appellants claimed payment of the above-mentioned rates upon these goods solely on the ground that the port of Rochester was inside an imaginary line which extends from Colne Point to Reculvers, two points on opposite sides of the river Thames, in argument referred to, for convenience' sake, as the Reculvers line. The respondents paid the rates under protest.

It is admitted that this Reculvers line lies considerably to the eastward of the seaward boundary of the Port of London. This latter is an imaginary line drawn from Warden Point on the south side of the Thames to Havengrove Creek on the north. Within the zone between these two imaginary lines lie on the

(1) (1888) 13 App. Cas. 595, at p. 600. (2) [1899] P. 223.

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southern shore of the Thames Whitstable and Herne Bay, and to seaward of the Reculvers line on the same shore Westgate and Margate, so that according to the right claimed by the appellants at the time they exacted these rates they could not have exacted them at all if the sailing barge had been bound for Westgate or Margate, though to arrive at either of these destinations she should have traversed more of the waters of the Port of London than if she had gone to Rochester, and would in addition have traversed the waters within the zone, as well as the waters seaward of the Reculvers line, the accommodation received in the Victoria Docks being in each case precisely the same.

It is further admitted that if the *Assyria* had sailed direct from Calcutta through part of the waters of the Port of London into the port of Rochester none of these rates could have been exacted. Nay, more; it is also admitted that according to the right claimed, if the *Assyria* had unloaded in the Victoria Docks all the cargo she carried, except this linseed, she could have delivered it at Rochester, Whitstable, or Ramsgate free of this rate.

These appear to me to be grotesque results, without any principle of reason or common sense to support them.

The question for the decision of this House then really is whether the construction of the Port of London Act, 1908, and the Port of London (Port Rates on Goods) Provisional Order Act, 1910, contended for by the appellants, from which these results necessarily follow, or the construction of these statutes adopted by the Court of Appeal, from which these results do not follow, is their true construction. The material portions of the two statutes to be considered are the 13th section of the first, and the 9th section of the second.

First as to sub-s. 1 of s. 13: This section has been styled, in argument, a charging enactment. It might much more correctly be styled an empowering enactment. It enables the Port Authority, subject to the provisions of the section, to impose certain rates on all goods imported from parts beyond the seas, or coastwise, into the Port of London, or exported to parts beyond the seas, or coastwise, from that port. The class of

goods which is liable to the rate exacted in this case is thus defined or ascertained.

The section further provides for exemptions or rebates being made, either by provisional order, or by the Port Authority, and enacts that the port rates charged by the Port Authority shall be charged equally to all persons in respect of the same description of goods under the like circumstances.

Now, it is quite clear that goods merely carried from one part of the Port of London to another part of the Port of London are not, as to that particular voyage, either imported into the Port of London or exported from the Port of London.

By proviso (*b*) of this sub-section it is enacted that the provisional order dealing with exemptions shall provide for exempting two classes of goods, namely, (1.) goods imported for transhipment, (2.) goods which remain on board the ship in which they were imported for conveyance therein to another port. These latter may, for convenience, be styled undisturbed goods. Stopping there for the moment, it will be observed that these undisturbed goods are to be exempted to whatever port they may ultimately be conveyed. The words are simply "another port." No matter how long the ship may lie in the docks, or what portions of the waters of the Port of London it may traverse, these goods apparently escape, but not more completely, as far as this portion of proviso (*b*) is concerned, than do goods imported for transhipment only.

Proviso (*b*) is equally imperative as to the exemption of each class. Both classes are placed on an absolute equality. The last clause of proviso (*b*), however, enacts that the provisional order may determine what goods are to be treated as goods imported for "transhipment only" for the purposes of exemption.

By s. 9 of the Provisional Order of 1910 it is proposed to put in force the powers indicated in this clause. It provides that no port rate shall be charged upon "transhipment goods." That is its first provision, and as subordinate to this it then enacts that the expression "transhipment goods" shall, in the Order, mean and include goods imported for transhipment only, and also the goods which I have styled "undisturbed goods." The

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equality of treatment of the two classes of goods, made imperative by proviso (*b*), is thus preserved.

But now comes the provision contained in the same section which, according to the appellants, destroys that equality of treatment altogether, and enables the second class of goods, namely undisturbed goods, though "transhipment goods," to escape, if they be carried out of the Port of London to any port whatever, while the other kind of "transhipment goods" are not to escape unless they be carried to a port beyond the Reculvers line. The words relied upon to establish this strange and, apparently, senseless anomaly are contained in the definition in s. 9 of the phrase, "goods imported for transhipment only." The definition runs thus: "For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to another port."

If the definition had stopped there the equality of treatment of the transhipped goods and the goods left undisturbed would, subject to the point as to the meaning of the word "sea," have been preserved. But other words are added to the definition upon which the whole argument turned. These words are "whether beyond the seas or coastwise." The effect, it is urged, of these added words is that while undisturbed goods may be conveyed to any port without being rateable, transhipped goods will be rateable unless carried to a port beyond the Reculvers line. This definition is only given for the purposes of s. 9. That is stated expressly; but the primary purpose of the section is stated in its first clause to be, to exempt equally from these rates all "transhipment goods," including in that term both undisturbed goods and transhipped goods properly so called.

The words "beyond the seas or coastwise" are here used to denote the situation of the port which is the ultimate destination of the goods, and just as the undisturbed goods which must be carried by water to that destination, inasmuch as they are to be carried in the ship in which they were brought to London, so must the transhipped goods be conveyed by sea only, as contradistinct from being conveyed, for any part of the transit, by land.

It was urged indeed that the goods in this case were not carried by "sea only," since they were carried over the waters of the Thames, within the Port of London, and that the Thames, though a tidal and navigable river for many miles above the Victoria Docks, is still a river and not a sea.

It is but fair, I think, to the Port Authority to say that they never put forward this point when they levied their rate. If it were a good point, then goods transhipped in the Port of London and carried to Edinburgh, Hull, Liverpool, or Calcutta would not have been carried by "sea only," since part of the voyage would, necessarily, have been over the waters of a river, and the whole object of the statute introduced for the very purpose of exempting goods transhipped in the Port of London and carried out of it in ships would be defeated. In my view it is plainly a bad point.

The main argument was rested, however, on the words "another port whether beyond the seas or coastwise." It was urged that by s. 3 of the Provisional Order it is provided that expressions defined in the Port of London Act, 1908, shall, unless the context otherwise requires, have the same meaning in this Order; that s. 13, sub-s. 5, contains a definition of the word "coastwise," and that that word must therefore bear the meaning thus given to it wherever it occurs.

The words of s. 13, sub-s. 5, run thus: "For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point."

These words are used in this 13th section for the purpose of indicating the places from which goods must be imported into the Port of London, or to which they must be exported from the Port of London in order to become goods liable to rates.

But the purpose of s. 9 is wholly different. Its purpose and object is to determine what goods, in order to be exempted from rates, are to be treated as "goods imported for transhipment only." The words "goods imported from beyond the seas or coastwise," where they first occur in s. 9, are really otiose, because the whole section purports to deal with goods which but for the exemption would have been rateable, yet no imported goods are rateable which are not imported into the Port of London from

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"beyond the seas or coastwise." So that these words are merely used to indicate that the goods imported for transhipment belong prima facie to the class of rateable goods. And, of course, the words must for that purpose have the same meaning as they have in s. 13, but where the words "beyond the sea or coastwise" are subsequently used in the section merely to indicate the ultimate destination of the goods after transhipment if they are to escape rateability, it by no means follows that the words are to bear the same meaning in this part of the section as they bear in the portion in which they first appear. In my view they are simply used in the second portion as equivalent to the word "anywhere."

That construction restores and establishes on a sure basis that equality of treatment between goods "transhipped" and goods "undisturbed" which it is plainly the object of both Acts to secure. As the latter may be taken to "any port," wherever situate, so may the former.

Sect. 43 of the Act of 1908 has no application whatever to the case of undisturbed goods brought from the Port of London to any other port, and in no way explains what is the particular vice in a barge into which goods have been transhipped and brought to Rochester which makes those goods liable to rates, which they would not have been liable to if they had been carried to Rochester in the ship which brought them into London.

I am, therefore, of opinion that the judgment appealed from was right and should be affirmed, and this appeal be dismissed with costs. I beg to move accordingly.

LORD DUNEDIN. (1) My Lords, in this case I began to prepare a judgment in accordance with the view which I held at the conclusion of the argument, but in doing so, and on carefully re-reading the judgment of Kennedy L.J. in the Court below, I came to the conclusion that that learned and lamented judge had so exactly expressed the arguments that weighed with me that I should really be guilty of plagiarism if I repeated what he had already said. I shall therefore only say that I agree with his judgment in toto.

(1) Read by Lord Atkinson.

LORD PARKER OF WADDINGTON. (1) My Lords, I agree that this appeal fails. The question to be determined arises on the construction of s. 13 of the Port of London Act, 1908, and the Provisional Order of the Board of Trade made thereunder, and confirmed by the Port of London (Port Rates on Goods) Provisional Order Act, 1910. The 13th section of the Act of 1908 provides, sub-s. 1, that all goods imported from parts beyond the seas or coastwise into the Port of London, or exported to parts beyond the seas or coastwise from that port, shall, subject to any exemptions or rebates to be contained in a provisional order to be made under this section, be liable to the port rates therein mentioned: provided (*b*) that the provisional order under the section shall provide for exempting from such rates goods imported for transhipment only or which remain on board the ships in which they were imported for conveyance therein to another port, and may determine what goods are for the purposes of such exemption to be treated as goods imported for transhipment only.

My Lords, the expression "imported or exported coastwise" is obviously here used in contradistinction to the expression "imported or exported from or to parts beyond the seas." Goods imported or exported from or to Newcastle would clearly be imported or exported coastwise, notwithstanding that the first part and the last part of their transit would be up or down tidal and navigable rivers. I think, therefore, that the term "coastwise" must include transit by tidal and navigable rivers as well as transit along the sea coast; and this is confirmed by sub-s. 5, which provides that for the purposes of the section goods shall not be treated as having been imported or exported coastwise unless imported from or to a place seaward of what has been called "the Reculvers-Colne line." This provision is not a definition clause as to the meaning of the word "coastwise," but a clause withdrawing from the operation of the section a particular class of goods which would otherwise be subject to such operation.

Passing to the Provisional Order, your Lordships will find the Board of Trade, pursuant to the duty imposed on them by s. 13,

(1) Read by Lord Parmoor.

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sub-s. 1 (*b*), of the Act of 1908, provided (clause 9) that no port rates should be charged on transhipment goods, which expression was to include as well goods imported for transhipment only as goods remaining on board the vessel in which they were imported for conveyance therein to another port. The clause then proceeds to provide that the expression "goods imported for transhipment only" shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port, whether beyond the seas or coastwise, as to which certain things therein mentioned are specified and proved. Here it seems to me that the expression "goods imported from beyond the seas or coastwise" has the same meaning as in sub-s. 1 of the 13th section of the Act of 1908, but clause 9 contains no provision such as that contained in sub-s. 5 of s. 13, limiting the application of the clause to a particular class or particular classes of such goods. It would, I think, be contrary to all proper principles of construction to import such a clause by inference. I do not think that the words, "for the purposes of this section," in sub-s. 5 of the 13th section of the Act of 1908, can be read as including all the purposes of the provisional order to be made by the Board of Trade under the 13th section. So to read it would, in my opinion, be to limit unduly the powers conferred on the Board of Trade, and, in fact, preclude such Board from exempting from port dues any goods imported for transhipment only where the transhipment is for the purpose of conveyance to a place landward of the Reculvers-Colne line. I do not think that this would be in accordance with the Legislature's intention. It would be an anomaly if a vessel coming to the Port of London with goods destined for places in the Medway had itself to proceed to the Medway in order to obtain exemption for such goods from port rates, although from every point of view it might be more convenient to tranship such goods into lighters for conveyance to their destination.

Some stress was laid in argument on the expression "for the purpose of being conveyed by sea only" as used in the 9th clause. It is to be observed that this expression is used in reference not only to conveyance coastwise but to conveyance

to parts beyond the seas. It appears to me, therefore, that the expression is used in contradistinction to conveyance by land and would exclude goods put overboard into lighters to be landed and sent by rail to Liverpool for exportation to America, but not goods transhipped for conveyance by water to Newcastle as their ultimate destination, although the first and last part of their transit might be said to be by river rather than by sea.

I think, therefore, the appeal should be dismissed.

LORD SUMNER. (1) My Lords, s. 13, sub-s. 1, of the Port of London Act, 1908, charges "all goods imported from parts beyond the seas or coastwise into the Port of London." "Imported" into the port means, in my opinion, brought in by water and not by land, and "coastwise" means from parts not beyond the seas. Sub-s. 5, pursuant to the initial words of sub-s. 1, qualifies this by excluding from charge goods coming from landward of the Reculvers Towers-Colne Point line, for it prescribes that they are not to be "treated" as having been "imported coastwise," that is, not to be treated as the subject of charge within sub-s. 1. There the effect of sub-s. 5 ends.

The rates to be charged and exemption from all charge are not dealt with by the Act of 1908 at all. They are wholly left to subsequent legislation, none the less that the Board of Trade is required to prepare a provisional order, so as to facilitate the passing of a further Act, whenever the Legislature shall be minded to do so. For the rates resort must be had to the schedule to the Port of London (Port Rates on Goods) Provisional Order Act, 1910, clause 9. This contains an exemption of certain goods from charge, namely, goods which are styled "transhipment goods."

These are defined as falling into two classes, which so far appear to be equally entitled to exemption. The first class is further defined by two terms, one dealing with the provenance of the goods, the other with their qualification for exemption. The first necessarily imports reference to the charging section of the Act of 1908 and its sub-sections, for unless the provenance of the

(1) Read by Lord Parmoor.

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goods is such as to make them subjects of charge they need no exemption at all. Accordingly here "coastwise" is used as it is used in s. 13 of the Act of 1908, reading sub-ss. 1 and 5 together and so far restricting the area to which the word "coastwise" applies. When the term which states the qualification of the goods for exemption is reached, we are dealing with new matter —namely, with rates of charge and exemption from charge— which the former Act did not prescribe at all. Hence there is no need here to import any reference to the language of s. 13 of the Act of 1908, and though the same term "coastwise" recurs it must be read in its ordinary meaning. Indeed, s. 13 of the Act of 1908 did not, strictly speaking, give that word a special meaning, but by sub-s. 5 restricted, by an express geographical limitation, the area to which its ordinary meaning would have otherwise applied. In the Act of 1910 that limitation neither recurs nor is involved; accordingly, there is nothing to interfere with the full effect of the ordinary meaning of "coastwise."

Two grounds are urged to the contrary: the first, that the word must be used with the same meaning in both of the two consecutive lines in which it occurs in clause 9; the second, that it is used in nineteen other places in the schedule and always in the same sense as when it first occurs in clause 9. This latter consideration does not really advance matters. It is used over and over again in that particular sense, because the context is the same over and over again and is one which imports a reference to the incidence of the charge in the first instance. Hence its repeated use in this sense is no weightier than its use in that sense once; but, in my opinion, there is no difference in the sense of the word itself between its first and its second occurrence in clause 9. The real difference is that when allusion is made to the charge, the context of the charging words, given to s. 13, sub-s. 1, by sub-s. 5, is necessarily drawn in, and so restricts the application of the word, but, when it is exemption only that is dealt with, that context has no place and so does not operate upon or restrict the natural meaning of the word. If the definition words in clause 9 be written out in full, this at once appears —"for the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported

from beyond the seas into the Port of London and goods imported coastwise into the Port of London, provided they be goods imported thither from a place seaward of a line drawn from Reculvers Towers to Colne Point, which goods have been so imported for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise," &c. I am unable to see why "coastwise" may not be an adjectival expression descriptive of the word "port" as one speaks of "coastwise navigation" or of a "coastwise voyage," just as the expression "beyond the seas" in the same clause is a descriptive adjectival expression. "Coastwise" is not a word of technical meaning: *Battersby* v. *Kirk*. (1) To refer both to "conveyed" is to rearrange this section, for which the reason that "coastwise" implies motion rather than situation seems to me to be insufficient. The whole subject is importation and conveyance, and in that connection the terminus ad quem may, not inappropriately if perhaps inelegantly, be called "coastwise," as well as the process of getting there.

The other point is this. It is said that these goods, even though imported for the purpose of being conveyed to any other port whether beyond the seas or coastwise, were not imported for the purpose of being conveyed by sea only, for they were to go down one river nearly to its statutory mouth and then turn up another river on reaching its statutory mouth, where it joins the former, and so never were to go to sea at all. In my opinion, here the natural antithesis to "by sea" is "by land," and is not "by river." If these words mean "for the purpose of being conveyed wholly by sea and never by river," transhipment goods going in another bottom to half the ports in Great Britain get no benefit from the exemption at all. For this the Act shows no reason, and it would conflict with the undoubted grant of exemption where they go in the same bottom. If they mean "partly by sea though partly by river," the word "only" is falsified. I see no adequate justification for resorting to any non-natural meaning of "by sea." What is being dealt with is "navigation" which is not "inland navigation." I think the appeal fails.

(1) (1836) 2 Bing. N. C. 584.

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LORD PARMOOR. My Lords, the steamship *Assyria* arrived from Calcutta for discharge at the Victoria Docks, in the Port of London, in June, 1912. She discharged 100 tons of linseed, part of her cargo, belonging to the respondents, within the port of London by putting them overside into a sailing barge, which took them to the port of Rochester, on the Medway. The appellants contend that the 100 tons of linseed are not "transhipment goods," or "goods imported for transhipment only," and, therefore, not free from port rates under s. 9 of the Port of London (Port Rates on Goods) Provisional Order Act, 1910. The question is whether this contention is well founded. I agree with the judgment of Pickford J. and of the majority in the Court of Appeal. In my opinion the appeal fails.

Sect. 13 of the Port of London Act, 1908, provides for the payment of port rates upon goods imported from the ports beyond the seas or coastwise into the Port of London, or exported to ports beyond the seas or coastwise from that port. In ordinary language port rates are charged on all goods from whatever port they come and to whatever port they go. Goods imported or exported coastwise mean goods imported or exported as between the Port of London and some other port in the United Kingdom. Goods imported or exported from or to ports beyond the seas mean goods imported or exported between the Port of London and some port outside the United Kingdom. The contrast arises in the position of the port of origin or the port of destination. In sub-s. 5 of the section a limitation is placed on the ordinary meaning of goods imported or exported coastwise for the purpose of the section. It is provided that goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point. The object of this limitation is to exempt from port rates goods which have not been carried across the line drawn from Reculvers Towers to Colne Point. But for this limitation, goods, not being goods for transhipment only, passing between the ports within the line and the Port of London would be subject to the same charges as goods passing coastwise between the Port of London and any other port in the United Kingdom.

Sect. 13 of the Act enacts that the provisional order to be made under the section shall provide for exempting from rates goods imported for transhipment only, or which remain on board the ship in which they were imported for conveyance therein to another port, and may determine what goods are for the purposes of such exemption to be treated as goods imported for transhipment only. This Provisional Order was made in 1910, and contains a definition of goods imported for transhipment only. For the purposes of exemption from port rates, goods imported for transhipment only mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port, whether beyond the seas or coastwise. It is admitted that the respondents complied with all the conditions entitling them to exemption if the 100 tons of linseed were imported for transhipment only. It is noticeable that the exemption applies to all goods, whether imported from beyond the seas or coastwise.

The main argument advanced on behalf of the appellants was that the 100 tons of linseed had not been conveyed coastwise from the Port of London to the port of Rochester, because they had not crossed the line from Reculvers Towers to Colne Point—in other words, that the limitation introduced into sub-s. 5 of s. 13 of the Act of 1908 should be read into the definition of goods for transhipment only in the Provisional Order for 1910. This contention is, in my opinion, untenable. There is no reason for construing the expression "coastwise," in the definition of goods imported for transhipment only, in any other than its ordinary natural meaning, or for excluding from the exemption goods imported from Calcutta, for the purpose of being conveyed by sea only, from the Port of London to the port of Rochester.

It was said that the area of exemption in the Provisional Order should be the same as the area of charge under the Act of 1908. The effect of the limitation of the expression "coastwise" in the Act is to exclude from the liability to port rates goods not carried outside a definite area, but the Provisional Order deals with a different subject-matter. The exemption is general, and the test is in the purpose for which the goods are imported, if the other conditions are satisfied. If goods are imported for the purpose

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of transhipment only to any port, whether beyond the seas or coastwise, the exemption attaches. There is no exception of certain ports because they are situate within the line from Reculvers Towers to Colne Point. The exemption applies to goods imported for the purpose of being transhipped from the Port of London to the port of Rochester.

It was further argued, on behalf of the appellants, that the goods of the respondents were conveyed along the Thames from the Port of London and along the Medway to the port of Rochester, and, therefore, were not conveyed by "sea only." In one sense, as was pointed out in argument, no goods transhipped at the Port of London are conveyed to any other port by sea only, since the Port of London is situate within the river Thames. I think, however, that the meaning of the words is clear. The contrast is necessarily between goods conveyed seaward from the Port of London to any other port, and goods conveyed inland by rail, road, or inland navigation. It makes no difference that the port of Rochester is approached by a river navigation. There are many ports both in the United Kingdom and beyond the seas approached by river or some form of artificial waterway, but the exemption depends on conveyance seawards from the Port of London and not on the nature of the approach to the port to which the goods are conveyed.

My Lords, I think the appeal fails.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 21, 1915.

Solicitors for appellants: *E. F. Turner & Sons.*

Solicitors for respondents: *Dollman & Pritchard, for Hayward, Smith & Challis, Rochester.*

[HOUSE OF LORDS.]

DRUMMOND . . . . . APPELLANT; H. L. (E.)*

AND

1915

June 10.

COLLINS (SURVEYOR OF TAXES) . . . . . RESPONDENT.

Revenue—Income Tax—Foreign Possessions—Property settled on Infants—Infants not entitled to Vested Interest—Discretionary Trust for Maintenance and Education—Remittances to Guardian in United Kingdom—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 41, 100, *Sched. D, Case* 5—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

A foreigner resident abroad by his will gave his property, which was situate abroad, to trustees upon trust for the benefit of his deceased son's children, who were minors, for life, and their issue after them, there being a provision that the trustees should accumulate the income of the respective shares of the children and add the accumulations to capital until each child should attain the age of twenty-five years, when the child was to become entitled to a portion of the accumulated fund. The will contained a direction to the trustees "out of the net income of the proportionate share of the trust estate held in trust for any child" to make such provision from time to time as they in their uncontrolled discretion might think necessary or advisable for the suitable maintenance and education of such child. The trustees from time to time remitted to the mother of the children, who was their guardian, and who was residing with them in England, sums of money in accordance with the provisions of the will for the maintenance and education of the children:—

Held, that these remittances in the hands of the mother were assessable to income tax under s. 100, Sched. D, case 5, of the Income Tax Act, 1842, as being moneys received in this country in respect of foreign possessions.

Decision of the Court of Appeal [1914] 2 K. B. 643 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Horridge J. (2) upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Daventry in the county of Northampton.

The appellant appealed to the Commissioners against an

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD WRENBURY.

(1) [1914] 2 K. B. 643. (2) [1913] 3 K. B. 583.

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assessment in the sum of 10,000*l.* for the year ending April 5, 1908, in respect of remittances from foreign possessions and made under s. 100, case 5, of the Income Tax Act, 1842, and s. 2, Sched. D, of the Income Tax Act, 1853. (1)

The case is fully set out in the report before the Court of Appeal. The material facts appearing from the case are as follows.

In 1890 the appellant married the late Mr. Marshall Field, junior, who died in November, 1905, and by him she had three children, Marshall, Henry, and Gwenderlyn, who were minors under the age of twenty-one years, and to whom she was guardian. In September, 1908, she married Mr. Maldwin Drummond, of 4, Down Street, Piccadilly, who was still living. The appellant's late husband, Mr. Marshall Field, junior, was the son of the late Mr. Marshall Field, of Chicago, who died in January, 1906, having by his will dated June 14, 1904, made certain provisions for his son, and, on the death of his son, for his son's widow and their children.

(1) By s. 5 of the Income Tax Act, 1853, the rules in the Income Tax Act, 1842, are rendered applicable, but the term Great Britain therein is to be read as the United Kingdom.

Income Tax Act, 1842, s. 100, Sched. D, Fifth Case: "The duty to be charged in respect of possessions . . . . in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain, and foreign possessions.

"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain, either for remittances from thence payable in Great Britain, or from property imported from thence into Great Britain, or from money or value received in Great Britain, and arising from property which shall not have been imported into Great Britain, or from money or value so received on credit or on account in respect of such remittances, property, money, or value brought or to be brought into Great Britain, computing the same on an average of the three preceding years, as directed in the first case, without other deduction or abatement than is hereinbefore allowed in such case."

Income Tax Act, 1853, s. 2, Sched. D: "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, ...

"And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act, ..."

The material clauses of the will affecting the children of the appellant were as follows:—

"Seventh. . . . . After the death of my son, if he shall die leaving any child or children or issue of a child or children him surviving, I direct said trustees to hold the trust estate and to apply the net income, and ultimately the capital, as hereinafter provided, for the use and benefit of all the children of my son surviving him, and for the use and benefit of the issue of any child or children that may have died, said issue taking a parent's share per stirpes. It is my will that in such case the trust estate and the income thereof shall be so held, administered, and applied by said trustees that each of my grandsons Marshall Field and Henry Field now living, or their respective issue, shall respectively receive a double portion, that is, twice as much as any other child, or issue thereof, of my son, and that any other surviving children of my son, and their issue per stirpes, shall receive equal shares. Out of the net income of the proportionate share of the trust estate held in trust for any child of my son, or issue of a child, I direct that said trustees make such provision from time to time as they in their uncontrolled discretion may think necessary or advisable for the suitable maintenance and education of such child, or issue thereof, until such child, or issue thereof, shall be entitled under provisions hereinafter contained to receive payments of income directly from said trustees. Such provision shall be paid over by said trustees from time to time to each such child, or issue thereof, or to the guardian or guardians of each child, or issue thereof, or may be otherwise applied for the benefit of each such child or issue thereof as said trustees may think desirable. If and so far as the suitable maintenance or education of any such child, or issue thereof, shall from time to time appear to said trustees to be sufficiently provided for in other ways or from other sources said trustees shall refrain from making any provision therefor out of said trust estate.

"In the cases respectively of my son's three children, now living, Marshall and Henry and Gwenderlyn, said trustees shall, upon the death of my son and subject to the above directions respecting provision for maintenance and education, retain and hold all the net income of their respective shares of the trust

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estate, and invest and reinvest the same for accumulation, and add the accumulations of income to the capital of their said shares, respectively, until my said three grandchildren shall respectively attain the age of twenty-five (25) years. From and after the time when they shall respectively attain the age of twenty-five (25) years said trustees shall pay over to them in regular quarterly installments (sic) during their lives, for their own use, one-half ($\frac{1}{2}$) of the net income of their respective shares of the entire trust estate, enhanced by accumulations added thereto as herein directed; and the other one-half ($\frac{1}{2}$) of the net income of their respective shares of the entire trust estate said trustees shall retain and hold and shall invest and reinvest for accumulation, adding the accumulations of income to the capital of their respective shares, until my said three grandchildren shall respectively attain the age of thirty-five (35) years. Thereafter from the time when they shall respectively attain the age of thirty-five (35) years said trustees shall pay over to them in regular quarterly installments during their respective lives, for their own use, all the net income of their respective shares of the entire trust estate. . . . ."

"Twenty-second. I direct that no title or interest in any of the several trust funds in my will created, or in the money or other property composing them, or any of them, or in the income accruing thereon, or in its accumulations, shall vest in any beneficiary under any such trust during the continuance of the trust; nor shall any beneficiary acquire any right in or title to any installments or installment of income otherwise than by and through the actual payment of each installment respectively by the trustee or trustees of the respective trust estates, and the receipt thereof in each case by the beneficiary; nor shall any beneficiary have any right or power by draft, assignment or otherwise, to anticipate or to mortgage or otherwise encumber in advance, any installments or installment of income, nor to give orders in advance upon the trustees or trustee for any installments or installment of income. . . . ."

At all material times the appellant resided with her three children in the United Kingdom.

Considerable sums had been remitted to the appellant by the

trustees of the will for the education and maintenance of her three children.

The Commissioners held that the appellant, as guardian of her children, was liable to be assessed in respect of these remittances and they affirmed the assessment accordingly.

Horridge J. affirmed the determination of the Commissioners. In his opinion the proportionate shares of the trust estate held in trust for the children were as to each of the children a foreign possession and the sums remitted were sums actually received in respect of foreign possessions. He was further of opinion that when once the trustees had exercised a discretion the sums to be remitted and which were in fact subsequently remitted were in themselves foreign possessions in respect of which the full amounts were received in Great Britain.

The Court of Appeal, by a majority (Cozens-Hardy M.R. and Sir Samuel Evans P., Joyce J. dissenting), affirmed this decision upon the first ground.

1915. June 8, 10. *Sir R. Finlay, K.C.*, and *P. O. Lawrence, K.C.* (with them *G. A. Scott*), for the appellant. These remittances are voluntary payments by the trustees for the maintenance and education of the children and are not taxable in the hands of the guardian as income of the children arising from foreign possessions as that term is interpreted in *Colquhoun* v. *Brooks*. (1) Upon the construction placed by the House of Lords upon s. 100, Sched. D, case 5, of the Act of 1842, and s. 2, Sched. D, of the Act of 1853, this case falls within neither of those provisions. Upon the true construction of this will the children have not a vested interest in the income out of which these allowances are being paid. The trustees have an uncontrolled discretion in regard to providing money for their maintenance and education, and the exercise of that discretion does not make the money the income of the children. Instead of remitting the money to the guardian for the children's education, the trustees might, if they had chosen, have paid the children's school or college bills direct, and in that case it could not have been contended that the sums so paid were

(1) (1889) 14 App. Cas. 493, at pp. 508, 516.

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taxable as income of the children. The liability of the appellant to be charged as guardian of the infants depends on s. 41 of the Income Tax Act, 1842 (1); but that section does not apply to a guardian of the person who has paid annual sums for the maintenance and education of the infants, but applies only to the guardian of the estate of the infants. So long as the infants are maintained and educated the guardian is not accountable to them for the surplus: *Jodrell* v. *Jodrell.* (2) The result is that the appellant is not hit by the words of any provision in the Income Tax Acts, and it is a settled rule in the construction of taxing statutes that a subject is not liable to be taxed unless he falls within the letter of the law: *Partington* v. *Attorney-General.* (3) [They also referred to *Blakiston* v. *Cooper* (4); *Poynting* v. *Faulkner* (5); *Duncan's Executors* v. *Farmer.* (6)]

Sir Edward Carson, A.-G., Sir F. E. Smith, S.-G., W. Finlay, K.C., and *T. H. Parr* (for *Raymond Asquith,* serving with His Majesty's Forces), for the respondent, were not called upon.

EARL LOREBURN. My Lords, in this case an American gentleman left by his will a large sum of money to trustees upon trusts which tied up his property with a view to its accumulation for a long time, and created a somewhat complicated series of interests. We have in my opinion no concern with the ultimate destination of these funds. We are concerned only with one provision. The will authorized and indeed required the trustees in America to exercise their discretion as to providing money for the maintenance of the testator's grandchildren, who are now minors. In pursuance of this authority the trustees exercised their discretion and remitted to the appellant, the mother of these children,

(1) Income Tax Act, 1842, s. 41: "The trustee, guardian, tutor, curator, or committee of any person, being an infant, or married woman, lunatic, idiot, or insane, and having the direction, control, or management of the property or concern of such infant, married woman, lunatic, idiot, or insane person . . . . shall be chargeable to the said duties in like manner and to the same amount as would be charged if such infant were of full age, ... "

(2) (1851) 14 Beav. 397, at p. 411.

(3) (1869) L. R. 4 H. L. 100, at p. 122.

(4) [1909] A. C. 104.

(5) (1905) 5 Tax Cases, 145.

(6) (1909) 5 Tax Cases, 417.

certain sums of money for their maintenance, and the Court of Appeal by a majority has held that these sums are chargeable with income tax because the lady and the children reside in England, and the money was received in England. I think the Court of Appeal and Horridge J., whose decision they affirmed, were perfectly right. The Income Tax Acts are framed in very general terms. It is necessary so to frame Acts of this kind lest some case manifestly within the purpose of the Legislature may escape the tax. But Courts of law have cut down or even contradicted the language of the Legislature when on a full view of the Act, considering its scheme and its machinery and the manifest purpose of it, they have thought that a particular case or class of cases was not intended to fall within the taxing clause relied upon by the Crown. A notable instance is the case of *Colquhoun* v. *Brooks* (1), decided nearly thirty years ago, and always followed. It was a decision of this House. This and similar precedents are often quoted in support of attempts to pare down the statutory language.

In the present case your Lordships were urged to do the same thing as was done in the case of *Colquhoun* v. *Brooks* (1), but to do it in respect of other language, and in my opinion without any justification at all.

It is abundantly clear that the present case falls within the letter of the Act. These sums were derived from remittances from America payable in Great Britain or from money or value received in Great Britain and arising from property that has not been imported into Great Britain. They also come within the words of Sched. D as profits or gains accruing from property to a person residing in the United Kingdom.

It was argued, however, that these allowances sent from America are not "income" of the children, because they were voluntary payments by the trustees. I do not assent to the proposition that a voluntary payment can never be charged, but it is enough to say that these were not voluntary payments in any relevant sense. They were payments made in fulfilment of a testamentary disposition for the benefit of the children in the exercise of a discretion conferred by the will. They were the

(1) 14 App. Cas. 493.

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children's income in fact. Then it was contended that the mother to whom the money was paid as guardian could not be charged as guardian under s. 41, because she had not control of the foreign property from which they were derived. I do not find any language in the section which gives countenance to this argument. The lady had control of the sums which are sought to be charged with the tax.

My Lords, I can see nothing in these Acts which leads to the view that property of this kind was intended to be free from this taxation, and the words of the Act clearly impose it. Lord Cairns long ago said that "if the person sought to be taxed comes within the letter of the law, he must be taxed." And though there have been cases in which the letter of the law has been disregarded in view of other statutory language, I think it can be done only in case of necessity. It must be a necessary interpretation.

LORD ATKINSON. My Lords, I concur and I have nothing to add.

LORD PARKER OF WADDINGTON. My Lords, I too concur.

The moneys transmitted in this case from America were certainly profits and gains arising from property. The property from which they arose was, equally clearly, a foreign possession within the meaning of case 5 as interpreted by the decisions of this House. Why then should these moneys not be subject to income tax?

As I understand the appellant's argument, it depends on the proposition that case 5 applies only to profits or gains from foreign possessions when these possessions belong to the person sought to be assessed, and that this property did not in the present case belong either to the infants or to their guardian.

In my opinion it is enough for case 5 to apply that the person to be assessed has such an interest in the property as to entitle him to the profits or gains in question. The infants had in my opinion such an interest. Though they might be incapable because of their age of giving a receipt for the money, it is in my opinion none the less clear that the money in question was,

as soon as the trustees had exercised their discretionary trust, held in trust for these infants as beneficiaries. Moreover, I do not see why the guardian who received the money for application on the infants' behalf should not be assessable under s. 41. This section is a collecting section and not a taxing section, and there is no reason in principle why it should not receive a liberal interpretation. It would in my opinion be too narrow a view if it were held that the section was only applicable if the guardian or other person mentioned in this section actually managed or held the control of this property or concern from which the profits or gains sought to be assessed arose. It seems to me enough that the guardian or other person should receive and have the direction and application on behalf of the owner of the profits and gains sought to be assessed.

LORD SUMNER. My Lords, I concur.

LORD WRENBURY. My Lords, upon this appeal there are two questions for decision—first, whether the remittances made to this country are income subject to income tax, and, secondly, whether, if they are, the appellant is a person proper to be assessed.

Upon the former question the first matter is to investigate upon the provisions of the will what the remittances in question are. In the events which have happened the trustees are by the will directed to hold the trust estate and to apply the net income for the use and benefit of the children. So far I find a direct and unfettered gift of the income in favour of the children. There follows a direction that out of the net income of the proportionate share held in trust for any child the trustees make such provision from time to time as they in their uncontrolled discretion think necessary or advisable for the maintenance and education of the child until he is entitled under provisions after contained to receive the income directly from the trustees. This provision may be paid to the child or to the guardian of the child. Subject to the above directions the income of the shares is to be accumulated until dates which have not yet arrived—at which dates payments are to be made to the children direct. In all this I

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find nothing contingent. The gifts are each one of them in favour of the children, but the dates for payment to the children are fixed with reference to the exercise by the trustees of their discretion or the ages from time to time of the children. At the time with which your Lordships have to do there could be no payment except by exercise of the discretion vested in the trustees, but so soon as their discretion is exercised in favour of the child the resulting payment seems to me upon the language of the will to be a payment of income to which the child is entitled by virtue of the gift made by the testator. I cannot see any ground upon which such income is not subject to income tax.

My Lords, let me, however, assume that the above reasoning is not correct, and that the interest of the infants is contingent, that is to say, that the income is income of the child in one contingency and income of another (the person entitled under the gift over) in another contingency—that the money which is paid for the benefit of the child is not income of the child rendered payable by the action of the trustees, but is income which but for the action of the trustees would have been income of some one else (the person entitled under the gift over) which only comes to the child because the trustees under the provisions of the will divert it from that other person and make it available for the child. It remains, however, that in this case directly the trustees exercise their discretion in favour of the child the interest of the child ceases to be contingent and becomes vested. Whether the money is paid to the child or to the guardian of the child or to the schoolmaster or the tailor or other person who supplies the wants of the child it is paid to or to the use of the child and is income of the child.

It is, however, contended that the case is not within the fifth case of the Act of 1842 for that this is not a foreign possession. This argument, if I rightly understand it, is that property, e.g., income derived from assets in another country is not a foreign possession unless the person taxed owns the corpus of the foreign possession. If this were true no life tenant or other person having a limited interest in property abroad would be assessable under the fifth case. The test is not, I think, whether there is an absolute interest in a foreign possession, but whether there is

such an interest in a foreign possession that the party assessed derives income from it. The case is, I think, within the fifth case, and whether this is so or not it is, I think, within Sched. D of the Act of 1853. The income is annual profits arising to a person residing in the United Kingdom from property situate elsewhere than in the United Kingdom. For these reasons I submit to your Lordships that the remittances are income subject to income tax.

Then is the appellant a party assessable? I think she is. She is trustee of the fund for the child and guardian of the child and has the direction, control, or management of the income being property of the child. The language of s. 41 of the Act of 1842 meets the case.

My Lords, I agree that the appeal fails and should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 10, 1915.

Solicitors for appellant: *Boodle, Hatfield & Co.*

Solicitor for respondent: *H. Bertram Cox, Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.)* 1915 July 9.

MITCHELL (SURVEYOR OF TAXES) . . . . . APPELLANT;

AND

EGYPTIAN HOTELS, LIMITED . . . . . RESPONDENTS.

Revenue—Income Tax—Company resident in England—Trade carried on Abroad—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, First Case, Fifth Case—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2; *Sched. D, s.* 5.

A company incorporated in England carried on from there an hotel business in Egypt till 1908. In that year they altered their articles of association by resolutions which provided that the Egyptian business of the company should be carried on and managed by a local board to the exclusion of any board of directors other than the local board. The local board were to meet only in Egypt, were to be affected by resolutions of general meetings held in Egypt only, and were to exercise all the powers of the company requisite for the Egyptian business. They were to retain the profits in Egypt and remit to England what might be necessary to pay dividends to shareholders resident here and for expenses incurred by the London board. The London board were to keep accounts, recommend dividends, and control the capital. The only business carried on by the company was the Egyptian hotel business. Since the alteration of the articles the London board had recommended a dividend and authorized the borrowing of a sum of money for that purpose. On an appeal by the company from an assessment to income tax made upon the full amount of the company's profits the General Commissioners found that the controlling power of the company remained with the London board and affirmed the assessment, and their decision was affirmed by Horridge J. but was reversed by the Court of Appeal:—

Held by Lord Parker of Waddington and Lord Sumner, that the division of the profits formed no part of the profit-earning business of the company and that the company's business was wholly carried on abroad, and consequently the company was assessable to income tax under the fifth case of Sched. D in respect only of profits remitted to this country.

Held by Earl Loreburn and Lord Parmoor, that there was evidence to support the finding of the Commissioners and that the company was

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* *Present:* EARL LOREBURN, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

assessable under the first case of Sched. D in respect of the whole of its profits.

Decision of the Court of Appeal [1914] 3 K. B. 118 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of Horridge J. upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the city of London.

At a meeting of the Commissioners held on December 1, 1910, the respondents (hereinafter called the company), whose registered office was at No. 11, Ironmonger Lane, in the city of London, appealed against an assessment to income tax of 43,332*l.* for the year ending April 5, 1909, made by the additional Commissioners of Income Tax on April 7, 1909, and allowed and confirmed by the General Commissioners on June 29, 1909. The assessment was made upon the company under Sched. D, case 1, of s. 100 of the Income Tax Act, 1842 (computed according to the rules of the Income Tax Acts), under the following circumstances.

The assessment was based on the profits of the company calculated on the average of the three previous years ending April 30, 1907, in accordance with the rules of the Income Tax Acts.

The company was registered in England on January 12, 1897, under the Companies Acts, 1862 to 1893, as a company limited by shares.

The memorandum of association provided (inter alia):

Clause 3. "The objects for which the company is established are:—

"(1.) To enter into and carry into effect with such modifications (if any) as may be agreed upon the agreement referred to in clause 3 of the company's articles of association.

"(2.) To carry on the business of hotel, restaurant, ... and lodging-house keepers" and other kindred trades and occupations as in the said articles mentioned.

"(6.) To procure the company to be registered or recognised in Egypt or elsewhere abroad.

"(16.) To borrow or raise money for the purposes of the

(1) [1914] 3 K. B. 118.

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company, and to give any security for the payment of money which may be deemed necessary or desirable, and for the purposes of securing money borrowed, or otherwise to create, execute and issue or re-issue mortgages, bonds, perpetual or redeemable debentures, &c."

Clause 5. "The capital of the company is 230,000*l.* divided into 11,500 preference shares of 10*l.* each and 115,000 ordinary shares of 1*l.* each."

By the articles of association it was (inter alia) provided:

Clause 3. "The company shall forthwith enter into an agreement with Mr. J. Ornstein for the purchase of Shepheard's Hotel and other hotels and property in Egypt in the terms of the draft agreement which has been already prepared. . . . ."

Clauses 58 to 85 dealt with general meetings and the proceedings and votes thereat, and clause 59 provided that general meetings should be held once a year at such time and place in London as might be prescribed by the company in general meeting, and if no time or place was so prescribed at such time and place as might be determined by the directors.

"POWERS OF DIRECTORS."

Clause 116. "The management of the business and affairs of the company shall be vested in the directors, and the directors, in addition to the powers and authority by these presents expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company, and are not hereby or by statute directed or required to be exercised or done by the company in general meeting, but subject nevertheless to the provisions of the statutes and of these presents, and to any regulations from time to time made by the company in general meeting, provided that no such regulation shall invalidate any prior act of the directors which would have been valid if such regulation had not been made."

Clause 117. "Without prejudice to the general powers conferred by the last preceding clause, and so as not in any way to limit or restrict those powers and without prejudice to the other powers conferred by these presents, it is hereby expressly declared

that the directors shall have the following powers, that is to say power:—"

Then followed certain sub-sections to the following effect, namely:

(1.) To pay preliminary expenses.
(2.) To acquire property.
(3.) To pay for property in shares, debentures, &c.
(4.) To secure contracts by mortgage.
(5.) To appoint officers, &c.
(6.) To accept surrender of shares.
(7.) To appoint trustees.
(8.) To bring and defend actions, &c.
(9.) To give receipts.
(10.) To authorize acceptances, &c.
(11.) To invest moneys.
(12.) To give security by way of indemnity.
(13.) To give percentages.
(14.) To establish reserve fund.
(15.) To make, vary, and repeal by-laws.
(16.) To make, rescind, and vary contracts.

"LOCAL MANAGEMENT."

Clause 118. "The directors may from time to time provide for the management and transaction of the affairs of the company in any specified locality, whether at home or abroad, in such manner as they think fit, and the provisions contained in the three next following clauses shall be without prejudice to the general powers conferred by this clause."

Clause 119. "The directors from time to time, and at any time, may establish any local board or agency for managing any of the affairs of the company in any specified locality, or may appoint any persons to be members of such local board, or managers or agents, and may fix their remuneration. And the directors from time to time, and at any time, may delegate to any persons so appointed any of the powers, authorities and discretions for the time being vested in the directors other than their power to make calls, and may authorise the members for the time being of any such local board, or any of them, to fill up

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any vacancies therein, and to act notwithstanding vacancies, and any such appointment or delegation may be made on such terms and subject to such conditions as the directors may think fit, and the directors may at any time remove any person so appointed and may annul or vary any such delegation."

Clause 120 empowered the directors by power of attorney under seal of the company to appoint any persons to be the attorneys of the company for such period and subject to such conditions as the directors might from time to time think fit, and any such appointment might if the directors thought fit be made in favour of the members of any local board.

Clause 122. "The company may exercise the powers conferred by the Companies Seals Act, 1864, and such powers shall accordingly be vested in the directors."

"DIVIDENDS."

Clause 124. "The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits."

Clause 125. "No larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend."

Clause 127. "The declaration of the directors as to the amount of the net profits of the company shall be conclusive."

"ACCOUNTS."

Clause 135 provided that the directors should cause true accounts to be kept, and clause 137 provided that the directors should lay before the company a profit and loss account and a balance-sheet.

Clause 138. "Every such balance-sheet shall be accompanied by a report of the directors as to the state and condition of the company, and as to the amount (if any) which they recommend to be paid out of the profits by way of dividend to the members, and the amount (if any) which they propose to carry to the reserve fund according to the provisions in that behalf herein contained, and the account, report and balance-sheet shall be signed by two directors and countersigned by the secretary."

The company acquired certain hotels in Egypt known as Shepheard's Hotel and the Ghezireh Palace Hotel at Cairo, and the said hotels during the period covered by the assessment and at the present time were the property of the company.

At an extraordinary general meeting of the company held in London on August 10, 1908, the special resolutions hereinafter mentioned were passed, and they were confirmed at a confirmatory meeting also held in London on August 27, 1908 (during the year of assessment appealed against in this case). Such special resolutions became operative on and from August 27, 1908.

The special resolutions were as follows:—

"That clauses 118, 119, 120, 121 and 122 of the articles of association of the company with the words 'local management' be repealed and that the following new clauses be substituted for the same, that is to say:—

"Local Board.—118. The Egyptian business of the company (which expression in these articles means and includes all the company's affairs and business whatsoever in Egypt and the Soudan, inclusive, amongst other things, of the business of carrying on the company's hotels in Egypt and the Soudan, and everything connected therewith, including the incurring of debts and liabilities, buying, selling and supplying goods, the hiring, using and supplying labour, paying of debts, and the doing of all things necessary or in any way incidental to such business) shall be carried on and managed by a local board, and that to the exclusion of any board of directors of the company other than the local board, and such local board shall be wholly independent of any other directors and board of the company and of general meetings of the company (not being general meetings of the company held in Egypt) and in no way under the control thereof. Only general meetings of the company held in Egypt shall (to the exclusion of general meetings held elsewhere) be competent to pass any resolution binding on the local board or having any binding force upon or in regard to the Egyptian business of the company. The local board shall meet only in Egypt or the Soudan and not elsewhere.

"119. The local board shall consist of not less than three and not more than seven persons, to be from time to time appointed

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by resolution of a general meeting of the company held in Egypt, and every member of the local board shall ipso facto vacate office if and when he is requested by resolution of a general meeting held as aforesaid to resign. The qualification of a member of the local board shall be the holding of shares of the company of the nominal value of 200*l.*, and he shall receive such remuneration as the directors may from time to time determine. A director may hold the office of member of the local board in conjunction with his directorship.

"120. Save as aforesaid, clauses 93 to 115 inclusive shall, mutatis mutandis (with any modifications necessary to make them applicable to the local board), apply to the local board and the members thereof as if the same were here repeated, but with the term 'local board' substituted for the term 'directors,' and with the term 'member of the local board' substituted for the term 'director,' and with the year 1909 substituted for the year 1899, and with the condition that any reference to a general meeting shall mean a general meeting held in Egypt.

"121. The Egyptian business shall be under the control of the local board (to the exclusion of any other board of directors of the company), who may in relation thereto exercise all such powers of the company as the local board in their opinion think requisite for the purpose of working, developing and dealing with the Egyptian business, and the profits of the Egyptian business shall be from time to time ascertained as and when the directors consider expedient, and unless and until and except as otherwise directed by the directors, the local board shall retain in Egypt the profits of the Egyptian business, and shall remit to England such sums only (*a*) as shall be necessary to enable dividends payable to persons in the United Kingdom to be paid, and (*b*) as may be specifically and specially required by the London board to be transmitted to London for expenses of the company incurred by that board in London. Dividends to persons outside the United Kingdom shall be satisfied out of profits retained in Egypt, and sufficient profits to pay any dividends from time to time declared which are payable to persons outside the United Kingdom shall be retained in Egypt and that notwithstanding any direction from the directors.

"122. The company may exercise the powers conferred by the Companies (Seals) Act, 1864, and such powers shall be vested in and exercisable by the local board.

"122A. The first members of the local board shall be Edward Aubrey Harrison, Esq., Jean Jaques Hug, Esq., and Emmanuel Constantin Zervudachi, Esq. The local board shall be constituted and empowered to act as such on and from the 1st day of April, 1908.

"122B. General meetings of the company may be held from time to time in Egypt. One such meeting shall be held in every year at such time and place as the local board may from time to time consider convenient.

"122C. Clauses 59 to 65 and 67 to 85 of the articles of association of the company shall apply, with the necessary modifications, to general meetings of the company held in Egypt and any reference to directors therein shall include a reference to members of the local board so far as relates to any general meetings held or to be held in Egypt. General meetings in Egypt shall only be concerned with Egyptian business.

"122D. The eight last preceding clauses shall be taken to override all the other regulations of the company not consistent therewith."

The business carried on by the company during the year of assessment was the carrying on of Shepheard's Hotel and the Ghezireh Palace Hotel which are situate in Egypt. These hotels were under the direct management of servants of the company. Since August 27, 1908, these servants were under the orders of the Egyptian local board in accordance with the powers and provisions set out in the special resolutions above referred to. During the year of assessment the company's profits were derived from the said hotels and no other source. Transfer fees of small total amount were received in England on transfers of shares. All the profits (except transfer fees) included in order to arrive at the average of the 43,332*l.* upon which the company was assessed as above mentioned were in fact derived from the said hotels.

Before and after August 27, 1908, all the meetings of the directors of the company had been held from time to time at

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the offices of the company in England and not elsewhere, and such directors were empowered to and did deal with the general affairs of the company, including all general financial arrangements of the company. The preference share capital amounted to 115,000*l.* The ordinary share capital amounted to 115,000*l.* The first mortgage 4½ per cent. debenture capital amounted to 75,000*l.* and the second debenture capital amounted to 49,000*l.*, and various reserve funds were in existence. In addition to the management of the financial arrangements of the company by the board of directors in England they had in 1897, immediately after the company was formed, invested large sums in the purchase of Shepheard's Hotel (Cairo), the Ghezireh Palace Hotel (Cairo), and the Victoria Hotel (Ismailia), and other lands in Egypt, including some lands forming part of the Ghezireh Palace site and surroundings and included in the purchase of the hotel. Such land had to be purchased as part of the terms of purchase of the hotel. In 1899 the company purchased a small piece of land opposite the Ghezireh Palace Hotel which was necessary to preserve its amenities. The Ghezireh Palace Hotel purchase included with the hotel about sixty acres of land, part of which the company did not require and accordingly sold as occasion offered, the latest sale, which was the compulsory sale to the Government of a small piece of land, taking place in March, 1907. For many years the company had also been engaged in developing portions of the above lands for building purposes and spent large sums for that purpose in road making, laying down water mains, and electric lighting, and had made large sales and had realized large sums for the sale of plots of such building land. Payment of part of the purchase-money on the said sales was made by instalments extending over a period of ten years from April, 1906. The company had created a sinking fund for the redemption of the debentures invested in the names of trustees for the debenture-holders under the debenture trust deed. On April 30, 1909, 29,791*l.* 3*s.* 5*d.* had been allocated for this purpose, but all of that fund except 44*l.* had on April 30, 1909, been from time to time applied in the purchase or drawing of first and second mortgage debentures.

A meeting of the directors was held in England on June 15,

1909. At this meeting June 29, 1909, was fixed as the day on which the general meeting of the shareholders should be held; it was decided to recommend a dividend of 5 per cent. on both the preference and ordinary shares of the company, payable on July 1; a draft of the directors' report and accounts was submitted and approved; the assistant secretary reported the financial position of the company, and he was authorized to obtain a loan of 10,750*l.* from the Anglo-Egyptian Bank and to transfer 2692*l.* 6*s.* 4*d.* to debenture interest account and 10,925*l.* to dividend No. 5 account in Cairo and London.

After August 27, 1908, no meeting of the company's board of directors was held in England or elsewhere until the above meeting of June 15, 1909. Since August 27, 1908, no meeting of the Egyptian local board had been held in England nor outside Egypt.

The directors' report and the accounts at April 30, 1909, were submitted and adopted at the twelfth annual meeting of the company held on June 29, 1909, in London.

Mr. (now Sir) W. B. Peat (a director of the company and a member of the firm of W. B. Peat & Co., the secretaries of the company who carried on business in England) gave evidence that the annual meetings of the shareholders (other than Egyptian meetings provided for by the amended articles of association) were held in England; that a considerable area of land was pledged by the trust deed dated January 29, 1897, to the trustees for the company's debenture-holders who held the deeds, and the above sales of land by the company were carried through from England and effected in accordance with the terms of the trust deed and were sold by the Egyptian attorneys for the debenture trustees (under power of attorney) in Egypt; that the common seal of the company was kept in this country; that the company had a bank account in England, but that the main bank account was kept in Egypt; that the dividends proposed to be paid were recommended by the directors in England and declared by general meetings in England once a year in or about June; that in the year of assessment the dividend was declared in June; that the dividends due to shareholders in the United Kingdom were paid in England to such shareholders,

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and the dividends due to foreign shareholders were not transmitted to the United Kingdom but were paid in Egypt or Switzerland (in which latter country the company also had another banking account); that since August 27, 1908, the special resolutions which then became operative had been strictly observed and acted upon; that the local management of the hotels was carried on exclusively by the local board in Egypt, who reported the financial trading results to the board of directors of the company in England for the purpose of being incorporated in the company's accounts and balance-sheets and acted upon for the declaration of dividends. After August 27, 1908, no dividends were declared during the year of assessment.

It was admitted that the company resided in England. The company had offices and a secretary in Egypt as well as in England. The hotels and Egyptian accounts were made up in Egypt and were there audited and certified locally in Egypt by Mr. Alfred Busby, chief accountant of Messrs. Thomas Cook & Son (Egypt), Limited, and were subsequently forwarded to the company's office in England and submitted to the general meetings of the company in London. The balance-sheets and the profit and loss accounts of the company were made out in London. All the accounts of the company were, except so far as rendered unnecessary by the local audit in Egypt, audited in England.

In reference to clause 118 of the amended articles of association of the company it was admitted that no general meetings of shareholders of the company had during the year of assessment or ever been held in Egypt. The local board in Egypt had from time to time regularly met in Egypt. This local board was composed of gentlemen permanently resident in Egypt. The board of directors had not met out of England except once about ten years ago, when it met in Paris.

It was contended on behalf of the company that the available profits of the company were made in Egypt alone; that the profits in fact came home to the company in Egypt from transactions and operations in and not outside Egypt; that since August 27, 1908, the company had in no sense whatever carried on business in connection with their hotels in the United

Kingdom, and that neither partly nor otherwise; that *Colquhoun* v. *Brooks* (1) governed the case and not *San Paulo (Brazilian) Ry. Co.* v. *Carter* (2); that in every sense since August 27, 1908, the hotel businesses were carried on or exercised exclusively in Egypt; that the company had ceased to carry on any of the hotel business in the United Kingdom on August 27, 1908, and in any event (if taxable at all under Sched. D, case 1) they were under obligation to pay income tax under case 1 only in respect of the period April 6, 1908—August 27, 1908, and not otherwise. The company expressed their willingness to pay in respect of this last-mentioned period.

The Commissioners having considered the evidence found that the head and seat and controlling power of the company remained in England with the board of directors of the company and were of opinion on the facts that the assessment was duly and properly made, and they dismissed the appeal.

The company thereupon expressed their dissatisfaction with the decision of the Commissioners as being erroneous in point of law and required them to state a case for the opinion of the High Court.

Horridge J. affirmed the decision of the Commissioners, but the decision of the learned judge was reversed by the Court of Appeal (Cozens-Hardy M.R., Buckley L.J., and Channell J.).

May 6, 7. *Sir John Simon, A.-G.*, and *W. Finlay, K.C.* (*Sir Stanley Buckmaster, S.-G.*, with them), for the appellant. The question is whether the alteration in the articles has exempted the respondent company from liability to pay income tax upon the whole of its profits under case 1 of Sched. D and has limited its liability to taxation to such parts of its profits as are remitted to Great Britain under case 5. [They referred to the Income Tax Act, 1842, s. 100, Sched. D, cases 1 and 5, and the Income Tax Act, 1853, s. 2, Sched. D, s. 5.] The directors in London of this company administer the affairs of the company in that they have to fix the remuneration of the local board and to determine the financial business of the enterprise. It is their business to determine when the profit and loss account

(1) (1889) 14 App. Cas. 493. (2) [1896] A. C. 31.

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shall be made out, what is the balance available for dividend, and what shall be done with that available balance, and they may authorize the borrowing of money, as they have done in this case, where that balance is insufficient. In short they manage the whole business of the company except so far as the Egyptian business is taken out of their control by article 118. Unless the only relevant business is the Egyptian business and unless all the financial side of the business is to be disregarded the Crown must succeed; and it has the finding of the Commissioners in its favour. The carrying on of any portion of its business in this country renders the company liable to be taxed on the whole of its profits. *Colquhoun* v. *Brooks* (1) decides that where there is resident in this country a sleeping partner in a foreign business and he takes no part at all in the management of the business, then he is liable to be assessed only on such part of the profits as are remitted to this country on the ground that the business is entirely managed abroad. That decision is contrary to the language of the Act of 1853, but it must be accepted. *San Paulo (Brazilian) Ry. Co.* v. *Carter* (2) decides that where a trade is carried on wholly or partly in the United Kingdom the assessment falls under case 1 of Sched. D and the duty is computed on the full amount of the profits. The Court of Appeal in this case have said that what the directors did in this country was not to carry on the business of the company but to decide what was to be done with the profits after the business had been carried on. That is a fallacy. In *Liverpool and London and Globe Insurance Co.* v. *Bennett* (3) Lord Sumner (then Hamilton J.) distinguishes between an individual trader and a trading company in respect of the carrying on of different trades and shows that the business of a trading company cannot be split up in the manner suggested. In *De Beers Consolidated Mines* v. *Howe* (4) Lord Loreburn lays down the principle as the result of the cases as follows: "The real business is carried on where the central management and control actually abides"—and the Commissioners find substantially in the terms of that

(1) 14 App. Cas. 493.
(2) [1896] A. C. 31.
(3) [1911] 2 K. B. 577, at p. 589; affirmed [1912] 2 K. B. 41; [1913] A. C. 610.
(4) [1906] A. C. 455, at p. 458.

judgment. Lord Loreburn also states his opinion, following *Cesena Sulphur Co.* v. *Nicholson* (1), that a company resides for purposes of income tax where its real business is carried on, and that is approved by Lord Haldane in *American Thread Co.* v. *Joyce.* (2) That statement involves that a trading company carries on some part at least of its business at the place where it resides, and this company admittedly resides in this country. It may be that *Colquhoun* v. *Brooks* (3) should be treated as applicable only to the case of an individual. This case more nearly resembles *Ogilvie* v. *Kitton* (4), where the sole proprietor of a business which was carried on by an agent on his behalf abroad was held assessable under case 1 of Sched. D. Here the company is the sole proprietor acting through its agents in Egypt, whom it may call to account. This case is governed by *San Paulo (Brazilian) Ry. Co.* v. *Carter* (5) and not by *Colquhoun* v. *Brooks.* (3)

Sir R. Finlay, K.C., and *A. M. Bremner*, for the respondents. This case falls within the principle of *Colquhoun* v. *Brooks.* (3) *Ogilvie* v. *Kitton* (4) is distinguishable. It may be conceded that if a trader appoints an agent to carry on a business for him, that is the business of the principal, for the agent is bound to obey the commands of his principal and the latter might revoke the authority of the agent at any moment. But under article 118 the whole control of the profit-earning business of this company is in the hands of the local board. The authority of the local board could not be revoked even by the company in general meeting in England except by altering the articles. The test is where is the control of the business? Here the local board are not subject to the control of the directors or of the company in England. It is only by going to Egypt that the company can exercise any control over them. The conclusion of the Commissioners is an inference from the construction of the documents; it is not a finding of fact but a conclusion of law. *Colquhoun* v. *Brooks* (3) lays down the broad principle that if the business is controlled abroad then it is to

(1) (1876) 1 Ex. D. 428.
(2) (1913) 6 Tax Cases, 163.
(3) 14 App. Cas. 493.
(4) (1908) 5 Tax Cases, 338.
(5) [1896] A. C. 31.

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be treated as a foreign possession. That principle has been adopted and extended by the Legislature in s. 10 of the Finance Act, 1914. This is an a fortiori case because in *Colquhoun* v. *Brooks* (1) the sleeping partner might, if he had been so minded, have taken an active part in the management, but here the company in England is precluded by its articles from exercising any control over the business. The Income Tax Acts draw no such distinction as is suggested between the liability of an individual and a corporation; they tax nothing but profits; they do not tax residence or trade. The division of the profits once they are earned is no part of the trade at all and is wholly immaterial to the question whether the tax is to be paid. The whole profit-earning business of this company was the carrying on of two hotels in Egypt. What constitutes carrying on trade within the meaning of Sched. D is shown by *Grainger & Sons* v. *Gough* (2) and *Erichsen* v. *Last*. (3) *San Paulo (Brazilian) Ry. Co.* v. *Carter* (4) proceeded on the broad ground that there to a great extent the business was in fact carried on in England.

Sir John Simon, A.-G., replied.

The House took time for consideration.

July 9. EARL LOREBURN. My Lords, I have felt great difficulty in this case, and if any point of law had been involved I should myself have desired a re-argument. But the law has been already laid down in two cases decided by this House, and the only question is whether or not this case comes within the principle. My own view is, on the whole, in accordance with that of Lord Parmoor, which I have had the advantage of reading in print, and I have nothing to add. It is a question of fact, and I think it is very near the line.

LORD PARKER OF WADDINGTON. (5) My Lords, the effect of the decision of this House in *Colquhoun* v. *Brooks* (1) may be stated as follows: Where a person resident in the United Kingdom is interested in a trade or business wholly carried on abroad, such trade or business for the purposes of the Income Tax Acts falls

(1) 14 App. Cas. 493.
(2) [1896] A. C. 325.
(3) (1881) 8 Q. B. D. 414.
(4) [1896] A. C. 31.
(5) Read by Lord Sumner.

under the head of "Possessions in any part of Her Majesty's Dominions out of Great Britain or Foreign Possessions," within the meaning of case 5 of Sched. D, and accordingly no part of the profits or gains of such trade or business is assessable to tax under Sched. D unless and until it be transmitted to and received in the United Kingdom. Where, however, the trade or business is carried on wholly or in part within the United Kingdom, the profits and gains thereof are assessable to tax under case 1 of the schedule. It is to be observed that in *Colquhoun* v. *Brooks* (1) the person alleged to be chargeable under case 1, though resident in England, was a partner in a trade or business carried on in Australia. He is called a sleeping partner, but this term is obviously used not in the sense of a partner who by the terms of the partnership contract had no power to interfere with or take part in the trade or business in Australia, but in the sense of a partner who, from one reason or another, had not interfered or taken part in such trade or business. In fact, though asleep for all the purposes of the trade or business during the whole period for which the profits and gains of the trade or business were said to be assessable under case 1, he might at any moment have shaken off his slumbers and joined with his Australian partners in the active management of the partnership affairs. The important point, therefore, was not whether he had power to interfere with the trade or business, but whether he had so in fact interfered during the period for which the Crown alleged that he was assessable under case 1.

My Lords, in considering whether the principle of *Colquhoun* v. *Brooks* (1) applies to any particular circumstances, it is also necessary to bear in mind your Lordships' decision in the case of *San Paulo (Brazilian) Ry. Co.* v. *Carter* (2), to the effect that a trade or business cannot be said to be wholly carried on abroad if it be under the control and management of persons resident in the United Kingdom, although such persons act wholly through agents and managers resident abroad. Where the brain which controls the operations from which the profits and gains arise is in this country the trade or business is, at any rate partly, carried on in this country.

(1) 14 App. Cas. 493. (2) [1896] A. C. 31.

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Lord Parker of Waddington.

I will now invite your Lordships' attention to the facts in this case. Since August 28, 1908, the affairs of the company have been regulated by the articles as altered by the special resolutions confirmed on August 27, 1908. According to these articles all the company's affairs and business whatsoever in Egypt and the Soudan are under the control of a local board, to the exclusion of the board of directors of the company, and of all general meetings of the company not held in Egypt. The local board holds its meetings in Egypt and not elsewhere. It is found by the special case that the business carried on by the company during the year of assessment was the carrying on of two hotels in Egypt, these hotels being under the direct management of servants of the company under the orders of the local board, and the profits of the company being derived wholly from such hotels. All the members of the local board reside in Egypt. Since August 27, 1908, the board of directors of the company have met once only. At this meeting a day was fixed for the annual meeting of shareholders, it was decided to recommend a dividend of 5 per cent., a draft of the directors' report and the accounts for the year ending April 30, 1909, was submitted and approved, and the secretary was authorized to obtain a loan from the company's bankers to enable the dividend to be paid. The annual meeting of the shareholders was held on June 29, 1909, when the directors' report and the accounts for the year ending April 30, 1909, were adopted and the dividend recommended by the directors declared.

Under these circumstances it appears to me indisputable that no single act has been done in or directed from this country by way of participation in or furtherance of the trade or business of the company from which the profits or gains said to be chargeable to income tax since August 28, 1908, have arisen. It was argued that a company can only have one business and that such business necessarily includes the passing of annual accounts, the declaration of a dividend if circumstances admit, and the financial arrangements necessary to enable such dividend to be paid. I cannot accept this argument. The trade or business we have to consider is a trade or business from which profits or gains can arise and not the business of disposing of and dividing such

profits and gains when they have arisen, and I can see no reason why a corporation any less than an individual should not be engaged in more than one trade or business at the same time.

The Attorney-General further insisted on the various powers which, even under the altered articles, are still retained by the board of directors of the company. He pointed out that the board of directors of the company have power to determine the remuneration of the members of the local board, to decide when the Egyptian profit and loss account is to be made out, what is to be done with the available cash in Egypt, how cash is to be provided for the Egyptian business if none be available, and generally to determine all questions of finance. It may well be possible that the board of directors of the company still retain powers by virtue of which they could, if occasion arises, so interfere with the company's business in Egypt that such business would cease to be carried on wholly outside this country, but, as I have already pointed out, it is not what they have power to do, but what they have actually done, which is of importance for determining the question which now arises for decision. In the absence of any act done or directed by any person resident here in participation or furtherance of the business operations in Egypt from which the profits and gains in question arose, I think your Lordships are bound to come to the conclusion that this trade or business was carried on wholly outside the United Kingdom, and, therefore, is within case 5 rather than case 1. If this be so the decision of the Court of Appeal must be confirmed and the appeal dismissed with costs.

LORD SUMNER. My Lords, where a resident in the United Kingdom is proprietor of a profit-earning business wholly situate and carried on abroad he is chargeable to income tax under case 5 of Sched. D if he takes no part in earning those profits, and, if he takes any part, is chargeable under case 1. This is true whether the proprietor is a natural or an incorporated person; whether he takes part in earning the profits in his own person or only by agent or servants. The question is whether the profits are wholly or partly earned from a business wholly or partly carried on in the United Kingdom. If he takes a part

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Lord Sumner.

at home in earning the profits, its importance relatively to that taken by his agents abroad does not matter, nor does the liability to be charged under case 1 depend on active interference. Control exercised here over business operations abroad, though they are far greater in volume or magnitude, will suffice for case 1: *San Paulo (Brazilian) Ry. Co.* v. *Carter.* (1) So, too, will mere oversight regularly exercised, even though actual intervention never becomes necessary, everything abroad going smoothly without it: *Ogilvie* v. *Kitton.* (2) Some actual participation in carrying on the trade is necessary, though it may not go beyond passive oversight and tacit control. It is not enough that the proprietor merely has the legal right to intervene; otherwise *Colquhoun* v. *Brooks* (3) would have been otherwise decided; for there the respondent was entitled to intervene at any time, though in fact he never did so, but took his share of the profits just as they happened to be earned by those in control abroad.

In the present case I think that the Commissioners have intended to state all the facts which they found to be proved and material. Their express findings are exhaustive, and they do not intend to involve any unexpressed findings in the general terms of their conclusion in paragraph 14 in favour of the Inland Revenue.

It is important to note that the dispute turns upon the narrow question whether the profits attributable to a definite period, namely, that commencing August 27, 1908, fall under case 1 or case 5. It is found that "during the year of assessment the company's profits were derived from the said hotels" (namely, hotels in Egypt), "and no other source." On August 27, 1908, certain alterations in the articles, bona fide and properly made, came into operation, the object of which was to secure that the said profit-earning business should thenceforward be wholly carried on abroad and not at all in the United Kingdom, where the company is admittedly resident. The question is whether this object was attained.

After the date above mentioned the board of directors met

(1) [1896] A. C. 31. (2) 10 F. 1003; 5 Tax Cases, 338.
(3) 14 App. Cas, 493.

only once during the year of assessment. At this meeting they authorized the assistant secretary to borrow 10,750*l.* from a bank in this country. The case finds that the local board in Egypt "reported the financial trading results to the board of directors for the purpose of being incorporated in the company's accounts and balance-sheets, and acted upon for the declaration of dividends," and, therefore, as I read it, impliedly finds, and certainly nowhere finds the contrary, that such results were adopted by the board of directors. This must have included adopting the remuneration payable to the local board, which the accounts showing these results must, if properly kept, have debited to the Egyptian trading. Under the amended article it was for the board of directors to fix the remuneration of the local board in Egypt, but, on the facts found in the case, in my opinion they did not exercise their powers. Rightly or wrongly, they allowed the remuneration to be fixed in Egypt. Again, the money was borrowed not for any purpose connected with earning the profits in question, but apparently for the purpose of raising funds with which to pay a 5 per cent. dividend on the ordinary shares, which could not be paid otherwise without depleting the working capital in Egypt. It is clear that this borrowed sum was not intended to feed the Egyptian business with further capital, still less had it played any part in earning the profits in question. Again, the board's power of deciding when a balance of profit or loss should be struck, so as to lead to the declaration of a dividend, does not seem to have been exercised. Accounts were made up in Egypt to the end of the usual financial year in time to be ready for the annual general meeting of the company, independently of any special exercise of its powers by the board of directors.

I am of opinion that what the board of directors actually did fell short of taking any part in or exercising any control over the carrying on of the business in Egypt, and that where the directors forbore to exercise their powers, the bare possession of those powers was not equivalent to taking part in or controlling the trading. Upon the facts found, as I understand them, I think that the profits in question arise from foreign possessions and that the decision of the Court of Appeal was right.

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Reference was made to *Liverpool and London and Globe Insurance Co.* v. *Bennett* (1), but there the matter in debate was the effect of making investments abroad under the direction of the company in this country, which it was part of the company's business to make in order to enhance the total volume of its profits. I do not think that case germane to the present appeal. The differences there pointed out between the trade of a natural person and his other private activities on the one hand, and the totality of the activities of a trading company in carrying on its trade in all branches on the other, are not material to the present question. The mere declaration and payment of a dividend here out of profits earned in a business otherwise wholly carried on abroad does not prevent the business in which the profits have already been earned from having been wholly carried on abroad. To say that part of a company's business is to pay dividends, if it has earned them, seems to me to be a play upon words. I think that the appeal fails.

LORD PARMOOR. (2) My Lords, the point for the decision in this appeal is whether the respondents, whose registered office is situate in England, are liable to pay income tax under case 1 of Sched. D upon the whole of their profits, or under case 5 upon a sum not less than the full amount of actual sums remitted to Great Britain. The Commissioners for the General Purposes of Income Tax for the city of London held that, on the facts, the assessment was duly and properly made under case 1. This decision was upheld by Horridge J., but reversed in the Court of Appeal.

My Lords, in my opinion the principles to be applied in the decision of this appeal have been settled in this House in the two cases of *Colquhoun* v. *Brooks* (3) and of *San Paulo (Brazilian) Ry. Co.* v. *Carter*. (4) In the latter case Lord Watson (at p. 40) states succinctly the ambit of the decision in *Colquhoun* v. *Brooks* (3): "In my opinion, the decision in *Colquhoun* v. *Brooks* (3) directly affirms the rule that every interest in the

(1) [1911] 2 K. B. 577; [1912] 2 K. B. 41; [1913] A. C. 610.
(2) Read by Lord Sumner.
(3) 14 App. Cas. 493.
(4) [1896] A. C. 31.

profits of trade, belonging to a person who is, within the meaning of the Act, resident in the United Kingdom, must be charged under the first case of Sched. D if the trade is carried on, either wholly or partly, within Great Britain or Ireland, and is chargeable under the fifth case, if the trade is exclusively carried on in any of Her Majesty's dominions out of the United Kingdom."

The question, therefore, to be determined in this appeal is whether the trade, of which the profits are sought to be charged, is carried on either wholly or partly within the United Kingdom, or exclusively carried on outside the United Kingdom. This is a question of fact to be determined by the Commissioners, if there is evidence before them from which their finding might, in reason, be drawn, or unless they have gone wrong on a point of law. I think that there was such evidence before them in the present case, and that their decision does not contravene any legal principle.

At an extraordinary meeting of the company held in London on August 10, 1908, certain special resolutions were passed and subsequently confirmed at a confirmatory meeting held in London on August 27, 1908. These special resolutions are set out in the case stated by the Commissioners. Their general effect is that the Egyptian business of the respondents should be carried on and managed by a local board, to the exclusion of the board of directors of the company, and that such local board should be wholly independent of any other directors and board of the company and of general meetings of the company (not being general meetings held in Egypt), and in no way under the control thereof.

The Egyptian business of the company includes all the company's affairs and business whatsoever in Egypt and the Soudan, including the business of carrying on the company's hotels in Egypt and the Soudan, and everything connected therewith, including the incurring of debts and liabilities, buying, selling, and supplying goods, the hiring, using, and supplying labour, paying of debts, and the doing of all things necessary or in any way incidental to such business. The profits of the company on which the income tax is sought to be charged are

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derived wholly from the Egyptian business. In the year of assessment the dividend was declared in June.

Mr. Peat, a director of the respondents, gave evidence that the special resolutions which became operative on August 27, 1908, had been strictly observed and acted upon, and that the local management of the hotels was carried on exclusively by the local board in Egypt, who reported the financial trading results to the board of directors of the company in England for the purpose of being incorporated in the company's accounts and balance-sheets and acted upon for the declaration of dividends. The Egyptian accounts were made up and audited in Egypt and subsequently forwarded to the respondents' office in London and submitted to the general meetings of the respondents in London. The balance-sheets and the profit and loss accounts of the company were made out in London, and all the accounts of the respondents, except so far as rendered unnecessary by the local audit in Egypt, were audited in England. As an instance of the extent to which the control of finance was exercised in England, the assistant secretary was authorized at a meeting of the respondents held in England on June 29, 1909, to obtain a loan of 10,750*l.* from the Anglo-Egyptian Bank, and to transfer 2692*l.* 6*s.* 4*d.* to debenture interest account, and 10,925*l.* to dividend No. 5 account in Cairo and London, to meet the financial requirements as at June 30, 1909. Before and after August 27, 1908, all the meetings of the directors of the respondents have been held from time to time in England and not elsewhere.

In addition to parol evidence the Commissioners had in evidence before them the memorandum and articles of association of the respondents. The respondents are an English company having its registered office in England, and, subject to the special provisions affecting the Egyptian business, the general management of the affairs of the company is, in the ordinary way, entrusted to the directors. The control of the share capital of the company was left with the directors, including the question of its increase or reduction. It was within the power of the directors to say when the profit and loss account of the Egyptian business should be made out and in what manner the available assets

should be allocated. The directors decided how much the Egyptian managers should be paid, and if the Egyptian business should be carried on at a loss in any particular year, the responsibility rested with them of making any necessary financial arrangements. On this evidence the Commissioners found that before and after August 27, 1908, the directors of the respondents were empowered to, and did, deal with the general affairs of the company, including all general financial arrangements of the company.

In my opinion there was evidence before the Commissioners on which within reason they could come to the above finding. It was open to the Commissioners to find that a business is not exclusively carried on outside the United Kingdom when all the general financial arrangements are dealt with and controlled at meetings held from time to time at the offices of the company in England. The Commissioners further found that the head and seat and controlling power of the company remained in England with the board of directors of the company. How far, in any particular case, the power over finance gives controlling power is a question for the Commissioners, but I find it difficult to appreciate how any trade or business can be exclusively carried on outside the United Kingdom by a company which has its offices in England and whose directors are empowered to and do deal with all the general financial arrangements of the company. I agree with Horridge J., that it is not possible to sever the business of the respondents in such a way as to hold that there is a cleaving line between general questions of finance and the local management in Egypt.

It was said in argument that although the directors in England had general controlling powers in matters of finance, there was no evidence that they exercised this power in relation to the Egyptian business. For the reasons already stated, I think that there was evidence on which the Commissioners could find that the directors of the respondents had not only the power to deal with all general financial arrangements of the company, but also exercised this power. It becomes, therefore, unnecessary to decide how far the reservation of a power of control, which has not been exercised, is in itself sufficient to negative a claim to be

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treated under case 5, but I do not desire to be understood as throwing any doubt on the decision in *Ogilvie* v. *Kitton*. (1)

My Lords, in my view the appeal should be allowed.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, July 9, 1915.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Broad & Co.*

[HOUSE OF LORDS.]

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CALEDONIAN RAILWAY COMPANY . . . APPELLANTS;

AND

GOVERNORS OF GEORGE HERIOT'S TRUST . . . . . RESPONDENTS.

Scottish Law—Superior and Vassal—Casualty—Railway—Lands purchased under Compulsory Powers—Statutory Title—Right of Superior to demand Casualty—Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 *Vict.* c. 19), *ss.* 80, 107, 126.

The Lands Clauses Consolidation (Scotland) Act, 1845, s. 80, provides that lands acquired under the Act may be conveyed by a statutory form of conveyance, which, being duly executed, and being registered in the appropriate Register of Sasines "within sixty days from the last date thereof," shall give a complete and valid feudal title to the promoters for all time.

Land held subject to a small feu duty was acquired by a railway company in 1867 under the compulsory powers of a special Act, which incorporated the Lands Clauses Consolidation (Scotland) Act, 1845, and was conveyed by a conveyance substantially in the statutory form, but the conveyance was not delivered until nine months after execution and was registered in the Register of Sasines at the date of delivery. The railway company had since regularly paid the feu duty, and on the death of the vendor in 1885 paid to the superior a casualty

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* *Present:* VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, and LORD PARMOOR.

(1) 5 Tax Cases, 338.

of composition, which was agreed at a year's rent. At the expiration of twenty-five years from the date of that payment the superior claimed, under s. 5 of the Conveyancing (Scotland) Act, 1874, a composition of a year's rent from the railway company. The railway company disputed the claim on the ground that the land was held under a complete statutory title:—

Held that, in respect that the company had not complied with the statutory requirement as to registration, the conveyance of 1867 did not operate as a statutory disposition; but that it operated as a common law disposition, and that the superior was entitled to recover the casualty in a petitory action.

The effect of the statutory form of conveyance considered.

Decision of the First Division of the Court of Session in Scotland, 1914 S. C. 601, affirmed.

APPEAL from interlocutors of the Lord Ordinary and the First Division of the Court of Session in Scotland. (1)

The action was brought by the respondents (hereinafter called the pursuers) to recover the sum of 1576*l.* 10*s.* 4*d.* alleged to be due from the appellants (hereinafter called the defenders) for a casualty of composition in respect of a piece of ground belonging to the defenders and now forming part of their terminal station and hotel at Princes Street, Edinburgh.

The facts appearing from the pleadings and the documents therein referred to were as follows.

By a special Act 29 & 30 Vict. c. cccxxv. the defenders were empowered to enlarge their station at Edinburgh and to erect an hotel in connection therewith and for that purpose to acquire certain scheduled lands, and the Act incorporated the Lands Clauses Consolidation (Scotland) Act, 1845. (2)

(1) 1914 S. C. 601.

(2) Lands Clauses Consolidation (Scotland) Act, 1845, s. 80: "Feus and conveyances of lands so to be purchased as aforesaid may be according to the form in the Schedules (A.) and (B.) respectively to this Act annexed, or as near thereto as the circumstances of the case will admit; which feus and conveyances, being duly executed, and being registered in the Particular Register of Sasines kept for the county, burgh, or district in which the lands are locally situated, or in the General Register of Sasines for Scotland kept at Edinburgh, within sixty days from the last date thereof, which the respective keepers of the said registers are hereby authorised and required to do, shall give and constitute a good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking, and their successors and assigns, to the premises therein described, any law or custom to the contrary notwith-

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In pursuance of these powers the defenders in 1867 acquired from one Isaac Scott a piece of ground, being the whole of the feu held by him of the pursuers' predecessors in title as superiors. The feu duty on the land was 1*s.* 3*d.* per annum, and the entry of heirs was taxed at double the feu duty, but the entry of singular successors was untaxed.

The transaction was effected by a conveyance dated August 12, 1867.

The conveyance (so far as material) was in the following form:—

"I, Isaac Scott, ... heritable proprietor of the subjects and others after disponed, In consideration of the sum of

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standing: Provided always, that it shall not be necessary for the promoters of the undertaking to record in any Register of Sasines any feus or conveyances in their favour which shall contain a procuratory of resignation or precept of sasine, or which may be completed by infeftment; and the title of the company under such last-mentioned feus or conveyances shall be regulated by the ordinary law of Scotland until the said feus or conveyances, or instruments of sasine thereon, shall have been recorded in a Register of Sasines."

The group of sections (107—111 inclusive) relating to lands subject to feu duty or other recurring payment was headed "And with respect to any lands which shall be charged with any feu duty, ground annual, casualty of superiority, or any rent or other annual or recurring payment or incumbrance, not hereinbefore provided for, be it enacted as follows:—"

Sect. 107: "It shall be lawful for the promoters of the undertaking to enter upon and continue in possession of such lands, without redeeming the charges thereon, provided they pay the amount of such annual or recurring payment when due, and otherwise fulfil all obligations accordingly, and provided they shall not be called upon by the party entitled to the charge to redeem the same."

Sect. 126: "And be it enacted, that the rights and titles to be granted in manner herein mentioned in and to any lands taken and used for the purposes of this Act shall, unless otherwise specially provided for, in nowise affect or diminish the right of superiority in the same, which shall remain entire in the person granting such rights and titles; but in the event of the lands so used or taken being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu duties or casualties to the superiors thereof, nor shall the said company be bound to enter with the said superiors: Provided always, that before entering into possession of any lands full compensation shall be made to the said superiors for all loss which they may sustain by being deprived of any casualties, or otherwise by reason of any procedure under this Act."

11,447*l.* 14*s.*, instantly paid to me by the Caledonian Railway Company, incorporated by an Act passed in the 8th and 9th years of the reign of Her Majesty Queen Victoria, chapter 162, entituled 'An Act for making a railway from Carlisle to Edinburgh and Glasgow and the North of Scotland, to be called the Caledonian Railway,' pursuant to the provisions of the said Act, and of another Act passed in the 29th and 30th years of the reign of Her said Majesty, chapter 325, entituled 'An Act for enabling the Caledonian Railway Company to alter the terminus of their railway at Edinburgh; to enlarge and improve their station there, and to erect an hotel in connection therewith, and for other purposes,' Do hereby sell, alienate, dispone, convey, assign, and make over from me, my heirs and successors, to and in favour of the said Caledonian Railway Company, their successors and assigns, forever, heritably and irredeemably," (then followed a description of the land in question) "Together with all rights and pertinents belonging to the subjects and others above conveyed and all such right, title, and interest, in and to the same as I and my foresaids are or shall become possessed of or are by the said Acts empowered to convey; but with and under the burdens, conditions, and servitudes, specified in an Instrument of Sasine in favour of me the said Isaac Scott, dated the 27th, and recorded in the Particular Register of Sasines for the shire of Edinburgh, the 29th days of July 1844 in so far as the same are not inconsistent with the Railway statutes: To be holden by the said Company and their successors for ever in terms of the foresaid Acts: With entry at the term of Whitsunday 1867, notwithstanding the date hereof; and I assign the writs and have delivered the same conform to an inventory thereof hereunto annexed and subscribed by me as relative hereto; and I assign the rents; and I bind and oblige myself and my foresaids to free and relieve the said Caledonian Railway Company and subjects hereby conveyed of all incumbrances affecting the same and of all feu-duties, casualties, and public burdens; and I grant warrandice; and I consent to registration hereof for preservation and also to registration in the General or Particular Register of Sasines:"

The conveyance contained a testing clause in the Scottish

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form and was duly signed by the vendor and attested. It also bore a warrant of registration signed by James Hope, W.S., as agent for the defenders.

The conveyance with the warrant of registration thereon was recorded in the new Particular Register of Sasines for the Sheriffdom of Edinburgh, &c., on May 15, 1868.

The pursuers averred that they were the immediate superiors of the said subjects and that the defenders were their vassals in the dominium utile thereof in virtue of the said conveyance; and they further averred that the defenders failed to record the conveyance in the Register of Sasines within sixty days of its date as provided by the Lands Clauses Consolidation (Scotland) Act, 1845.

The defenders by their fourth answer averred as follows: "Although said conveyance was signed by the said Isaac Scott on 12th August, 1867, he agreed with the defenders that the transaction should not be completed until Whitsunday 1868, on condition that the defenders should pay him interest on the compensation money at the rate of 4½ per cent. up to Whitsunday 1868. In accordance with this arrangement the compensation was paid and the conveyance delivered to the defenders on 15th May, 1868, and the conveyance was recorded by the defenders on the same day. The said conveyance was thus recorded within sixty days of the date when it was first delivered to them and when it was first possible for them to record it. The date of delivery, viz. the 15th May, 1868, was the last date of the conveyance within the meaning of section 80 of the Lands Clauses Consolidation (Scotland) Act, 1845. Under the said recorded conveyance, the defenders acquired a statutory title to the lands, and all rights of superiority then vested in the pursuers' predecessors were extinguished and no longer subsist, in virtue of the Lands Clauses Consolidation (Scotland) Act, 1845, which is incorporated in the statutes referred to in the dispositive clause of said conveyance."

The pursuers admitted that the conveyance was delivered on May 15, 1868, but denied the other averments in this answer.

Since their acquisition of the subjects, the defenders had regularly paid the pursuers the feu duty of 1*s.* 3*d.* In 1885, on

the death of Scott, a demand was made upon the defenders by the pursuers for payment of a composition of a year's rent of the subjects, and on October 26 of that year the defenders made payment to the pursuers of a composition of 479*l.*, being, in terms of the receipt granted at the time, "payment of the casualty of superiority consisting of one year's rent as adjusted under deduction of the feu-duty for the year and an allowance for taxes and repairs due on the entry of the said company to the said subjects; declaring that the next casualty shall be payable and exigible on the 26th day of October 1910."

The defenders explained that these payments were made in error and averred that no feu duty or composition was or could be legally exigible from them at any time since the completion of their statutory title in 1868, when all rights of superiority in or over the said lands were destroyed in virtue of the Lands Clauses Consolidation (Scotland) Act, 1845.

No claim for compensation under the Act had ever been made by the pursuers against the defenders.

By condescendence 6 the pursuers averred that under s. 5 of the Conveyancing (Scotland) Act, 1874, a composition of a year's rent of the said subjects became due and payable on October 26, 1910, on the expiry of a period of twenty-five years from the date of the previous payment, and they arrived at the figure of 1576*l.* 10*s.* 4*d.*, the sum sued for, by taking the rental of the subjects, which they estimated at 1854*l.* 16*s.*, and deducting therefrom the feu duty and an allowance of 15 per cent. for taxes and repairs. The defenders by their answer denied liability and disputed the amount of the composition.

The pursuers pleaded (inter alia):

"6. The defenders having failed to record the conveyance in their favour within sixty days of its date, as provided by the Lands Clauses Consolidation (Scotland) Act, 1845, have not acquired a statutory title to the subjects thereby conveyed."

The defenders pleaded (inter alia):

"1. No title to sue.

"2. The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons, and the action should therefore be dismissed.

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"3. The pursuers not being the superiors of the defenders in the subjects in question, which are vested in the defenders under a duly completed statutory title, have no right to demand the casualty sued for, and the defenders should therefore be assoilzied.

"4. Alternatively, if the pursuers are the superiors of the defenders in the subjects in question, the action is incompetent as laid."

The Lord Ordinary (Lord Cullen) repelled the first, second, third, and fourth pleas in law for the defenders; sustained the sixth plea in law for the pursuers; and allowed the parties a proof of the averments in condescendence 6 of the record and the answer thereto. Lord Cullen was of opinion (1.) that the conveyance of August 12, 1867, conformed in substance to the statutory style of conveyance provided in s. 80 and Sched. A of the Lands Clauses Consolidation (Scotland) Act, 1845, but that, though it was habile in point of form to found the special statutory right and title to the land introduced by that Act, it was equally habile as a common law transmission of the feu; (2.) that, in respect that the conveyance was not registered within sixty days of its date in the Register of Sasines, it was not habile to constitute the special statutory right and title to the lands, and that the defenders in respect of their registered title were infeft in the lands as the vassals of the pursuers.

The First Division (Lord Skerrington, Lord Johnston, and the Lord President) adhered to the interlocutor of the Lord Ordinary, but on different grounds. They unanimously held that the defenders had acquired a good statutory title; but the Lord President and Lord Skerrington were of opinion that the effect of the statutory title was to create the relationship of superior and vassal between the parties modified to this extent, that while the pursuers could demand payment of all feudal prestations till redeemed they could not enforce them by any of the feudal remedies; Lord Johnston, on the contrary, was of opinion that no feudal relationship was created by a statutory title, but that, until the defenders had compensated the pursuers for the loss of their superiority rights, they continued liable for payment of all feudal prestations which would have been due had the relationship of superior and vassal existed.

1914. Nov. 26, 27; Dec. 8, 9, 10, 11, 14. *Clyde*, *K.C.*, and *Blackburn*, *K.C.* (with them *John L. Wark*) (all of the Scottish Bar), for the appellants. The law of Scotland as to land tenure differs from the law of England inasmuch as the Statute Quia Emptores prohibiting subinfeudation does not apply to Scotland and the title to land in Scotland depends upon the relationship of superior and vassal. The history of the law is given by Lord Dunedin in *Duke of Argyll* v. *Campbell.* (1) By Acts passed in 1845, 1847, 1858, 1868, and 1874 various alterations have been made in the practice of conveyancing in Scotland, but in its essential particulars the law remains to-day as it was before. At the time of the passing of the Lands Clauses Consolidation (Scotland) Act, 1845, a corporation could not be forced upon a superior because in the absence of special bargain the superior would be deprived of his casualty of composition in respect that a corporation never dies; but in the earlier private legislation the difficulty was got over by taking the conveyance to trustees. The Lands Clauses Consolidation (Scotland) Act, 1845, which consists of a collection of forms used in private Acts, was copied from the English Act and adapted to Scotland by a draftsman having a very limited knowledge of the Scottish land laws. The main object of the Act, as of the previous private Acts,—*Macfarlane* v. *Monklands Ry. Co.* (2); *Todd* v. *Clyde Trustees* (3)—was to get rid of the rights of superiority and to give the railway company a clean title free from all feudal incidents, while compensating the superior for the loss of his rights. Accordingly the Act provides a statutory form of conveyance which, upon registration as therein provided, shall give to the promoters "a complete and valid feudal title" for all time, any law or custom to the contrary notwithstanding (s. 80 and Scheds. A and B). By the statutory form of conveyance the lands are conveyed "according to the true intent and meaning of the said Act." That is inconsistent with the idea of a holding of a superior and points to a conveyance of a non-feudal character. The decision of the majority of the First Division runs counter to a series of decisions which establish that a conveyance under this Act in

(1) 1912 S. C. 458. (2) (1864) 2 Macph. 519, at p. 529.
(3) (1841) 3 D. 586; (1842) 1 Bell's App. 459; (1843) 6 D. 108.

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statutory form puts an end to the relationship of superior and vassal and confers a good title against the superior and all the world: *Magistrates of Elgin* v. *Highland Ry. Co.* (1); *Magistrates of Inverness* v. *Highland Ry. Co.* (No. 1) (2); *Magistrates of Inverness* v. *Highland Ry. Co.* (No. 2) (3); *Fraser* v. *Caledonian Ry. Co.* (4) It is said by the respondents that this is a common law conveyance because since the Titles to Land (Scotland) Act, 1858, a common law conveyance would be substantially in the same form, but that cannot determine the character of this conveyance. The respondents base their claim to relief upon ss. 107 and 126. Sect. 107, which contemplates the possibility of the feudal charges being redeemed, as provided by s. 8, applies only to a voluntary common law conveyance where land is purchased by agreement under the powers of s. 6. It relates solely to existing feudal charges and obligations, for it is impossible to redeem a charge which has ceased to exist. [They referred to *Bridge of Allan Water Co.* v. *Alexander*. (5)] But the provisions of s. 80 involve the destruction of all such charges and obligations, leaving to the superior nothing but his right to compensation, and therefore s. 107 can only operate upon a common law disposition. The superior's right to compensation for the loss of his feudal rights is included in s. 20, which is wide enough to embrace all claims for compensation. Sect. 126 (which as it stands makes nonsense), so far as it deals with a case in which the whole feu is taken, was intended to safeguard the voting qualification of the superior notwithstanding that the relation of superior and vassal was broken. Then it is said that the conveyance was not registered within sixty days from the last date thereof. But, first, the Act nowhere makes registration within sixty days a condition of the validity of the title, and the failure to register within the prescribed time does not entail a nullity: see *Duchess of Sutherland* v. *Reid's Trustees* (6); secondly, the appellants have complied with the requirements as to registration. "The last date thereof" means the date of delivery. Execution denotes sealing and delivery, and until delivery the

(1) (1884) 11 R. 950.
(2) (1893) 20 R. 551.
(3) 1909 S. C. 943.
(4) 1911 S. C. 145.
(5) (1868) 6 Macph. 321, 324.
(6) (1881) 8 R. 514.

conveyance was a merely ambulatory instrument. But, assuming that the appellants have not acquired a railway title, they have no title at all: *Paterson* v. *Douglas* (1); and they are not liable for casualties, whoever else may be liable. Lastly, assuming that the appellants have a common law title, the respondents cannot recover by a petitory action, but the action should have been for declarator of non-entry.

Murray, K.C., and *Chree, K.C.* (with them *G. Muir Thornton*) (all of the Scottish Bar), for the respondents. The conveyance in this case is apt rather to confer a common law title than a statutory title under s. 80. The concluding clauses of the conveyance, as also the registration with warrant, form no part of the statutory conveyance, but point to a common law conveyance. But assuming that this conveyance confers a statutory title, that does not put an end to the rights of the superior. Whether the conveyance is in statutory form or in common law form it leaves the relation of vassal and superior undisturbed. There is no question of acquiring the rights of the superior. It is said that the rights of superiority have been extinguished, without any agreement with the superior and without service upon him of a notice to treat, by an arrangement between the vendor and purchaser with which the superior has no concern, and that the superior is left with nothing but his statutory right of compensation. That is not a reasonable construction of the Act. As regards compensation, s. 20, upon which the appellants rely, does not apply to a superior at all, but the extent of the section is coincident with ss. 17, 18, 19; but, assuming that it includes the rights of superiority, the railway company must serve the superior with a notice to treat. The words "valid and complete feudal title" in s. 80 refer to the title as between disponer and disponee, leaving the superior out of view, and give to the railway company the title they would have acquired if they had taken infeftment on an a me vel de me disposition in common form. That satisfies the obligations on both sides. This House, unless forced to do so by the language of the section, will not place upon it a construction which would disturb the feudal law of Scotland. The object of the section was, by providing a

(1) (1705) 2 Ross's L. C. 78.

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statutory equivalent to infeftment, simply to put the railway company in the position of their disponer, and then, if the superior proved recalcitrant,—if he objected that the disposition was to a corporation—the company could redeem his rights under s. 107. The appellants' construction of s. 80 involves writing out of the statutory title the word "feudal," in respect that it creates a title unknown to the law of Scotland. If the statutory form of conveyance confers an allodial title, what is to happen where there is a succession of superiors, as may occur in Scotland, as distinguished from England; and what is to happen when the land passes out of the possession of the company by assignment, as it may do in certain events? The root of the difficulty which has arisen in the construction of this section is to be found in the view of the law expressed by Lord Justice-Clerk Inglis in *Macfarlane* v. *Monklands Ry. Co.* (1) That view proceeds on the fallacy that it is contrary to public policy that a railway company should be exposed to diligence at the hands of the superior; but the theory that a railway company is sacrosanct cannot now be maintained. Sect. 126 suggests that the feudal relationship continues. The appellants refer s. 126 to the naked right of superiority, but there is no justification for that construction, which renders the latter part of the section unnecessary. The section relates to the clothed estate. Then as to s. 107, it is said that that section relates to common law titles only, but that is inconsistent with the scheme of the Act. Sect. 107 is the first of a group of sections dealing with lands subject to recurring payments, and must be read together with the succeeding sections, 108—111, which it is not suggested are limited to common law conveyances. Sects. 99—124 deal with various outside interests and include every kind of title, and they form a statutory code on this subject. The meaning of s. 107 is that possession is conditioned by liability to pay the feudal charges until redemption, whereas s. 126 relates to compensation and nothing else. This is the view of these sections taken in *Magistrates of Elgin* v. *Highland Ry. Co.* (2) and in *Magistrates of Inverness* v. *Highland Ry. Co.* (No. 1). (3) The

(1) 2 Macph. 519. (2) 11 R. 950.
(3) 20 R. 551.

copyhold sections in the English Act are analogous, and under those sections it has been held that there is no extinction of the lord's rights until enfranchisement: *Lowther* v. *Caledonian Ry. Co.* (1); *In ré Marquis of Salisbury and London and North Western Ry. Co.* (2); *Lord Leconfield* v. *London and North Western Ry. Co.* (3) If this analogy applies there can be no answer to the respondents' claim. As to the want of registration, registration within the stipulated period is a condition precedent to a statutory conveyance. Here there has been no registration of the conveyance within sixty days of the last date thereof, for it is hopeless to contend that delivery can be treated as the last date of the conveyance. The result is that it takes effect as a common law conveyance: *Johnston* v. *Pettigrew* (4); and, if this is a common law conveyance, the only action open to the respondents is a petitory action: *Magistrates of Inverness* v. *Highland Ry. Co.* (No. 1). (5)

Clyde, K.C., replied.

The following cases were also referred to:—*Marquess of Linlithgow* v. *North British Ry. Co.* (6); *Scottish North Eastern Ry. Co.* v. *Gardiner* (7); *Munro* v. *Munro* (8); *Inspector of Poor of St. Vigeans* v. *Scottish North Eastern Ry. Co.* (9)

The House took time for consideration.

1915. March 25. Viscount Haldane L.C. My Lords, this appeal is brought against an interlocutor of the First Division of the Court of Session, the effect of which was to render the appellants, who were defenders, liable for the amount of a casualty.

The appellants, the Caledonian Railway Company, in 1867, under the statutory powers conferred by a private Act which incorporated the Lands Clauses and the Railways Clauses (Scotland) Acts of 1845, had bought ground, which comprised the entirety of his holding, from a Mr. Scott. His conveyance to them was dated August 12, 1867, but it was only registered in

(1) [1892] 1 Ch. 73.
(2) [1892] 1 Ch. 75, n.
(3) [1907] 1 Ch. 38.
(4) (1865) 3 Macph. 954.
(5) 20 R. 551, at p. 572.
(6) 1912 S. C. 1330; 1914 S. C. (H. L.) 38.
(7) (1864) 2 Macph. 537.
(8) F. C. May 19, 1812.
(9) (1870) 8 Macph. (H. L.) 53.

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the appropriate Register of Sasines on May 15, 1868, a date more than sixty days after the last date on the conveyance itself. Scott's holding was subject to a small feu duty, and the entry of heirs was taxed, but the entry of singular successors was untaxed. He died in 1885, and a casualty was then demanded from the company by the respondents, who claimed to be the superiors. The amount of the casualty was agreed at 479*l.*, being a year's rent of the ground as at that date. This was paid, and the company accepted a receipt signed by the respondents' secretary which contained a declaration to the effect that the next casualty should be payable in 1910.

My Lords, I do not think that the form of this receipt can in itself be taken either as imposing on the company any contractual liability, or as a personal bar against their raising the present contention, which is that no casualty has at any time been exigible from them.

The more serious questions which arise are two. Having regard to the provisions of the statutes under which the company bought, did there of necessity arise such a relation of superior and vassal as to enable the respondents in any case to claim a casualty? Secondly, if the company had the power to obtain a title which would free them from this relationship, did they in fact do so, bearing in mind the nature of the conveyance they took and the circumstance that they did not register it within sixty days, as prescribed by s. 80 of the Lands Clauses Act, from its last date?

My Lords, for reasons which I will state later, I am of opinion that the second question must be answered in the negative. But having regard to the fact that the first question has been elaborately considered both by the learned judges of the First Division and in the arguments addressed to us, I do not think that under the circumstances we can pass it by, even although, if we agree that the second question must be answered in the negative, such opinions as we express on the first question will not affect the result.

I therefore proceed to deal in the first instance with the question whether it was competent at the date of the conveyance for a company acquiring land under the provisions of the Lands

Clauses (Scotland) Act of 1845 to do so in such a way that a complete title could be acquired independently of the immediate superior of the seller, and that as a result such liability as is sought to be enforced in the case before us did not arise. It is important to bear clearly in mind what the character of the present action is. It is not a proceeding claiming arbitration, or for compensation under s. 6 of the Railways Clauses (Scotland) Act, 1845, or under ss. 20, or 108, or 126 of the Lands Clauses Act of that year. It is a purely petitory action founded on an alleged statutory right to a liquidated sum.

The learned judges in the Court below have differed as to the character of this right. According to the Lord President and Lord Skerrington the appellants are the vassals of the respondents, and are liable for casualties to their superiors, with whom they became entered under the Conveyancing Act, 1874. According to Lord Johnston, what the company took was not a feudal title, but a statutory fee simple free from the incidents of feudal tenure, yet subject to a purely statutory liability, created by s. 107 of the Lands Clauses Act, for an amount equivalent to what would have been the feudal prestation had a feudal relationship existed.

My Lords, the point on which this difference of opinion has arisen is one of considerable difficulty. We have had the advantage of listening to arguments from both sides of the Bar characterized by great ability and thoroughness. We have also had before us the diverging opinions of judges of wide experience in feudal conveyancing. Two feudal lawyers of great eminence, Lord President Inglis and Lord Kinnear, have expressed views on the question, and the general conclusion to which they came was concurred in by another judge well versed in the learning of the older generation about heritable rights. I refer to Lord Adam. But not only have the majority of the learned judges from whom this appeal is brought dissented from these views, but they have been the subject of difference of opinion in earlier cases. The question comes before this House for the first time. We are not bound by authority, and we must therefore consider it on principle and in the light of the provisions of the statute on which it turns.

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My Lords, the first point to be determined is whether s. 80 of the Lands Clauses Act establishes, as the appellants contend, a new kind of title, the creation of the statute, as an alternative to the old feudal title. I will turn presently to the language of this section, but before I do so I will advert to the nature of what it is said to have replaced by another tenure. For in order to appreciate the significance of the enactment it is essential to bear in mind the character of an ordinary feudal title as it stood under the law of Scotland in 1845. The Crown was, as it still is, the fountain of all feudal rights. The grantee of the Crown was entitled, as its vassal, to hold all that was contained in his grant on the conditions, and only on the conditions, defined in the grant. At that time, and up to the Conveyancing Act of 1874, he could do what a Crown grantee has not been able to do in England since the Statute "Quia Emptores"; he could, without restriction, sub-feu to a vassal of his own, who then possessed on the terms of his sub-grant. Since the passing of the Conveyancing Act of 1874 he has still been free to sub-feu, but with this qualification on his freedom, that on infeftment his disponee is, by s. 4, sub-s. 2, of that statute, in contemplation of law and automatically, entered with the nearest superior whose estate would not under the old law have been defeasible at the will of the disponee so infeft. But the changes effected by statute have recognized the broad underlying principle that, if any vassal failed to fulfil the conditions of a grant, the land could be resumed by the superior free from all subordinate titles created by the vassal. The real nature of the right of the superior was thus that his grant precluded him from claiming anything but the fulfilment of the conditions he had stipulated for, so long as these conditions had not been violated. But should this have happened forfeiture of the grantee's title must take place, and the superior became free to claim the right to enter by virtue, not of a new title, but of what was his original and inherent radical right.

The purchaser of land could take a subordinate title by feu from a mid-superior. But if he desired to have a title which was more nearly complete and more free from risk of a forfeiture, he took along with his disposition from his vendor an authority

which enabled him to claim entry with the superior of whom the vendor held. For the privilege of such entry he had to pay that superior a casualty of composition, but he got a feudal title from him, yet imperfect in so far as the land might be forfeited through the act of the superior himself. The only way to make a title which was to retain a feudal character really perfect and complete so far as theory went was thus, as it appears to me, to get rid of all mid-superiorities and enter directly with the Crown.

My Lords, in this state of the law the Lands Clauses Act was passed. Sect. 80 enacts that feus and conveyances of land to be purchased under the Act may be according to the forms in Scheds. A and B, or as near thereto as the circumstances of the case will admit. These feus and conveyances being duly executed and being registered in the specified Register of Sasines within sixty days from the last date thereof are to "give and constitute a good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking and their successors and assigns to the premises therein described, any law or custom to the contrary notwithstanding."

The section further provides that it shall not be necessary for the promoters to record in any Register of Sasines any feus or conveyances which shall contain a procuratory of resignation or precept of sasine, or which may be completed by infeftment, and the title under such last-mentioned feus or conveyances is to be regulated by the ordinary law of Scotland until the feus or conveyances or the instruments of sasine thereon shall have been recorded in the Register of Sasines.

The effect of these provisions is that where the powers conferred by the Act are used for the purchase of lands, whether voluntarily or compulsorily, a title to the lands so purchased may be completed in the statutory form, of which it appears to me to be one of the conditions that the conveyance should be registered within sixty days from its last date. But if the promoters choose they can, as an alternative, refrain from registering, and make up a title on any appropriate procuratory or precept or by infeftment, and in such a case what they obtain is a title regulated by the ordinary law applicable under the feudal system.

My Lords, the construction of s. 80 would not, as I read the

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language, appear to be ambiguous in its consequences if the section stood by itself. But there are subsequent sections which must be read along with it and are far from easy to reconcile with what would appear to be the natural interpretation of its words. The Act is badly drawn. The draftsman seems in more places than one not to have realized clearly the nature of changes which he was seeking to effect. I think it is idle to try to find in the various sections a consistent and harmonious purpose. The only way of dealing with the enactment is, therefore, to take the words as they stand and to endeavour to interpret them in the way which does least violence to their natural meaning. It is after hesitation that I have come to some conclusions which I now proceed to express, and at these I have arrived only because I cannot satisfy myself that the language adopted by Parliament when it passed the Act of 1845 leaves me free, without doing violence to it, to come to any other.

My Lords, confining myself for the moment to the first of the two alternative modes of making up a title offered by s. 80, I agree with Lord Johnston, who was on this point in a minority in the Court below, that what the company obtains if it registers is not such an ordinary feudal title as the Lord President and Lord Skerrington thought, but a title of a new kind which is the creature of the statute. The precise character of this statutory title it is not necessary for the purposes of this case to decide. One view is that the title can only be at once perfect and feudal within the language of s. 80 if the company is to be regarded as holding immediately of the Crown as superior, for it is to be observed that the language of the section is that the new title is to be feudal. According to this view it can only become a complete and valid feudal title in all time coming, the general law and custom to the contrary notwithstanding, if the rights of all mid-superiors, by whom entry can no longer be demanded, are eliminated. This construction of the words negatives the notion of an implied entry with the immediate mid-superior. Indeed such an entry would not only have failed to confer a complete and valid feudal title in all time coming, but was itself foreign to the law as it stood in 1845. As Lord Kinnear pointed out in the first of the two Inverness cases which were cited to us,

"Entry means nothing more than the recognition or confirmation by the superior of a title which is imperfect until it is so confirmed."

My noble and learned friend, Lord Dunedin, in the opinion which he is about to deliver and which I have had the advantage of reading, points out three other possible constructions. The first is that contended for by the respondents, and in substance adopted by the Lord President and Lord Skerrington, that the statutory conveyance is only an ordinary conveyance in a different form and does not detract from the rights of the superior. I agree with my noble and learned friend in thinking that it is impossible to reconcile this view with the language of s. 80. The second is that a statutory title arises, differing from the statutory title according to the view which I have referred to already in this, that the title arising is allodial, so that there is no implied entry with the Crown. A difficulty about this view which presents itself even more strongly to me than it does to my noble and learned friend is that I do not think that the expression "feudal" in s. 80 can be satisfied by the hypothesis of an allodial title. The third possible construction which Lord Dunedin refers to is one which would make the section enter the disponee by operation of law with the superior in a manner analogous to that afterwards enacted by the Conveyancing Act of 1874. For the purposes of the present case it is, as I have said, unnecessary to decide whether the second or third of these interpretations is a true one. But I desire, like my noble and learned friend, at least to guard myself against being supposed to acquiesce in the interpretation contended for by the respondents and adopted by the majority of the learned judges of the First Division.

What the section appears to do is to enable the company to obtain a perfect title in a form which neither requires nor enables it to enter with the superior in the usual way. I find myself unable to accept the view of Lord Skerrington that the words of the section can be satisfied by construing them as creating a tenure which is feudal, but which forbids feudal forfeiture just as it forbids voluntary alienation. No doubt the effect of the general legislation, of which s. 80 forms a part, is to enact that as the company acquires for a statutory and public purpose it

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cannot freely alienate, either directly or indirectly, land which it has been enabled to acquire solely for that purpose. But it is not s. 80 which imposes this restriction, nor has s. 80 any bearing on it that I can discover. The section is confined in its object to the form in which a title is to be made up, and there is no reason for giving to its words any other than their natural significance. It appears to me that the reference made by the learned judge to what has no concern with the completion of title, but really belongs to the application of the principle of ultra vires, is not relevant to the only question which arises under s. 80. Nor does what he says about the assumption being that the granter of the disposition possesses not only an undoubted right to the subjects, but also a valid progress of titles showing, inter alia, that the lands are not in non-entry, appear to carry the matter further. No doubt, as a general rule, the seller has to make out a good title, even when the sale is made under the Lands Clauses Act. This rule is indeed subject to certain exceptions referred in s. 74. But assuming it to hold, I am unable to see how it makes any difference to the question before us, for it is in the language of s. 80, and not in any of the earlier sections of the Act, that the answer to the question which arises must be sought.

My Lords, whichever of the three constructions of s. 80 to which I have alluded as possible is adopted, the subsequent sections, notably ss. 107 to 111 and s. 126, are of importance. The group of sections 107 to 111 inclusive belongs to a part of the Act which has the heading "And with respect to any lands which shall be charged with any feu duty, ground annual, casualty of superiority, or any rent or other annual or recurring payment or incumbrance not hereinbefore provided for." Sect. 107 confers on the promoters the right to enter without redeeming any of these charges unless called on to do so, provided they pay the amount of the annual or recurring payment and otherwise fulfil all obligations.

My Lords, it may well be that, the principle of the Act being the provision of an equivalent in money for rights in land taken, the section is to be read as referring to the state of things existing when the land was taken, and as imposing, as the condition of

the right to enter on it, a statutory obligation to make payments equivalent to any annual or recurring liabilities then existing. A feu duty may come within the words. Possibly a casualty of ascertained amount, which the disponee would have had the right to tender, may also fall within them, notwithstanding that the disponee is regarded as having been automatically entered. Moreover, this may be the result where the transaction is one to which s. 5 of the Act of 1874 applies, so that where the automatic entry is that of a corporation a liquidated sum is made payable every twenty-five years. But I am wholly unable to see how, in a transaction prior to 1874, s. 107 can impose any liability in the case of a conveyance to a corporation. For a corporation had no right to an entry, and it was only by special bargain that it could obtain one, usually by agreeing to pay a composition which might or might not have been recurrent. It seems to me that in such a case the superior is thrown back for his remedy on other sections, which provide for compensation for loss of title. The latter part of s. 126 may possibly be read as covering such a case, or it may be that it is covered by earlier sections. No question of compensation is before us, and I refrain from speculation as to what ought to be the answer to such a question were it to arise. What I am concerned to say is that, in my opinion, a petitory action could not have been brought under s. 107 for a composition claimed because a corporation had obtained any one of the three possible varieties to which I have referred of statutory title under s. 80.

My Lords, these considerations would have led me, had the appellants when they actually registered their conveyance in 1868 registered it in time, to hold that all right to a declarator of non-entry was gone, and that no right to bring this action under s. 107 had been conferred by the Act of 1845. As the present proceeding is not one for compensation that would have disposed of the appeal. But the question does not arise. For the appellants did not register within sixty days from the last date of the conveyance. I think, after consideration, that it is impossible to regard the date of delivery as the last date of the conveyance. I think it equally impossible to treat compliance with the requirement as anything short of a condition of

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obtaining the new kind of statutory title. I am unable to hold with Lord Johnston that the Infeftments Act of 1845, or the Titles to Land Act of 1858, repealed this condition. Whether or not the original reason for its introduction became obsolete, the condition remained unaltered in the statute, and I see no way out of the difficulty in which failure to comply with it has placed the appellants. As the result of this failure their conveyance had in my opinion the effect only of a disposition under the common law. I think it was sufficient as such a disposition.

My Lords, if this be so, then the effect of the Act of 1874 was that the appellants were automatically entered with the respondents as their superiors, and became liable to the action for declarator and payment which that Act provides. It is true that the summons in the present action is not in form declaratory but is confined to a purely petitory conclusion. But the appellants paid a casualty in 1885 after they had become entered by force of the Act, and a declaratory conclusion such as this Act prescribed would have been on the second occasion of payment unnecessary and inappropriate.

I think that the appeal fails and must be dismissed with costs, and I move accordingly.

LORD DUNEDIN. My Lords, the general question, which has been argued in this case with conspicuous care and ability, is as to the rights of a superior against a railway company, which has taken, in virtue of compulsory powers given in a special Act, a piece of ground belonging to a vassal of the said superior. I use the phrase "in virtue of" compulsory powers because it has not been doubted that, assuming the land to be within the limits as to which compulsory powers are given by the special Act, it makes no difference whether the actual acquisition is effected by private bargain or by notice to treat, followed by arbitration or jury trial. This question has been frequently discussed and has given rise to much diversity of judicial opinion. While the fact may be regretted, it can scarcely, perhaps, be wondered at. For the real cause of trouble is to be found in the faulty phraseology of the Lands Clauses Consolidation (Scotland) Act, 1845, in so far as it deals with this topic.

None of the cases which have dealt with the matter have been before your Lordships' House, so that so far as binding authority goes the matter is open.

My Lords, let me first state a few uncontroverted propositions. By the special Act a railway company—what follows is equally true of any statutory promoter, but I take the specific case of the railway company for convenience—is empowered to make and maintain certain works; and for that purpose, and that purpose only, is given power to acquire lands within certain limits. The exact extent of the lands to be acquired is usually left to the judgment of the promoters. The lands are to be taken from the owners thereof, and the method of taking is regulated by the provisions of the Lands Clauses Act, which is incorporated in the special Act. "Owner" in Scotland is the proprietor of the dominium utile, that is to say, the vassal, and not the superior. Consequently the superior never receives a notice to treat.

Now, the conception of the Lands Clauses Act is to provide for the taking of the land from the owner thereof, and then to deal by separate provisions with the burdens affecting the lands so taken; and the radical error which has pervaded the mind of the draftsman of the Act is that one of these burdens on the property is the superiority, whereas, if you had asked a Scottish lawyer of the eighteenth century if the superiority was a burden on the dominium utile, he would infallibly have answered that, so far from that being the case, the dominium utile was rather of the nature of a burden on the superior's title. That this is no mere form of words, but represents something that may have a practical effect, is well illustrated by the case of *Edmonstone* v. *Jeffray*. (1)

It is, however, but a short step to be able—in this case I think with absolute certainty—to put one's finger on the origo mali. The statute is there and has got to be dealt with, and the duty of a Court of law, in my opinion, is, if possible, so to interpret a statute as to allow of its spirit being fulfilled, provided only that in order so to do it does not read into the statute provisions which are not there.

The provisions of the statute which deal directly with the

(1) (1886) 13 R. 1038

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position of a superior whose vassal's lands, or a portion of them, have been acquired by the railway company are the fasciculus of sections beginning with s. 107, and the isolated s. 126. But there falls also to be considered the indirect effect of s. 80, which, though not dealing directly with the superior, yet deals with the title to the land in a way which on interpretation may affect the superior's rights and the superior's remedies.

Let me now state the precise question for determination in the present case. The Caledonian Railway Company in 1866, by special Act, obtained powers to enlarge their terminal station at Edinburgh, and for that purpose to acquire certain scheduled lands. Among them was a piece of ground held by one Isaac Scott of the Governors of Heriot's Hospital as superiors. The feu duty of said lands was 1*s.* 3*d.*, and the entry of heirs was taxed at double the feu duty; but the entry of singular successors was untaxed. On August 12, 1867, Mr. Scott granted a conveyance of the whole of the ground held by him in favour of the railway company. This conveyance was registered in the Register of Sasines on May 15, 1868. Since that date the railway company has regularly paid the feu duty of 1*s.* 3*d.* Mr. Scott died in 1885, and thereupon the Governors of Heriot's Hospital made a claim for a composition of 479*l.*, being a year's rent of the subjects as at that date, which was paid on October 26, 1885, the receipt granted for it having in it the following clause: "Declaring that the next casualty shall be payable and exigible on the 26th day of October 1910." The 26th October, 1910, being passed and no further payment having been made, the respondents, the Governors of Heriot's Hospital, raised the present action, which is a simple petitory action for 1576*l.* 10*s.* 4*d.*, being the sum which they allege represents a full year's rent of the subjects after the usual deductions.

It is an arguable point whether the conveyance by Isaac Scott in 1867 is in such a form as to make it a conveyance in the form specially authorized by s. 80 of the Lands Clauses Act, or whether it is a conveyance habile as a common law deed to effect infeftment by the registration in the Register of Sasines in 1868, and entry so soon as the Conveyancing Act of 1874 had passed, in virtue of s. 4, sub-s. 2, of that Act.

The Lord Ordinary held that though in such a form as to satisfy the requirements of s. 80, yet inasmuch as it was not registered within sixty days of the date of its execution it could not claim the privileges, whatever they were, of the statutory form. He held, however, that it was habile as a common law conveyance, and he accordingly held that under the provisions of s. 5 of the 1874 Act a composition was due, and he remitted for proof as to the true amount of the rental and proper deductions in order to fix the sum for which decree would fall to be given.

The learned judges of the First Division adhered to this judgment, but on entirely different grounds. Lord Skerrington and the Lord President held that the form of title was immaterial; that the actuality lay in the fact that the ground now belonged to a railway company and was held by them for the purposes of a statute-prescribed undertaking; that the result of that was that the relationship of superior and vassal still existed between the respondents and the appellants; but that the respondents' remedies, so far as these remedies could result in eviction, were gone. In so holding they incidentally went counter to the opinions of the majority of the judges of the same Division in the four decided cases of *The Magistrates of Elgin* (1), the two *Inverness* cases (2), and the case of *Fraser* v. *Caledonian Ry. Co.* (3); and also, I humbly think, to the judgment in the second *Inverness* case, which opinions had laid it down that if a statutory title in the form sanctioned by s. 80 was made up and registered the effect was to extinguish the relationship of superior and vassal quoad these lands.

So far, it will be observed, the conclusion at which the learned judges arrive is, so far as action is concerned, negative. When it comes to where the authorization is to be found for the positive claim sought to be enforced by the present action, I confess the judgments, after repeated perusal, have left me in great perplexity —a perplexity which the very able counsel for the respondents were unable to remove. Let me assume that the position is as said: that the relationship of superior and vassal remains, but

(1) 11 R. 950. (2) 20 R. 551 and 1909 S. C. 943.
(3) 1911 S. C. 145.

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the remedies so far as involving eviction are gone. A personal action for feu duty will remain competent, for it exists in respect of the relationship of superior, and decree given in it could never, per se, involve eviction. But what is it that gives a petitory action for a composition, such petitory action being quite impossible under the old law? The words of the Lord President, though not explicit, are consistent with the idea that the right is created by the 107th section of the Lands Clauses Act. Lord Skerrington, however, with whom the Lord President says he agrees, expressly repudiates this view when he says, "I cannot construe s. 107 as creating a statutory right of a pecuniary character in lieu of a feudal right which did not exist in the year 1866, when the special Act was passed." If this be so, then the only two views I have been able to put to myself are either that the relationship of superior and vassal existing and the remedies so far as involving eviction being gone, there springs into being a sort of equitable right to have a petitory action for the sum of money which, if the remedies had been extant, would have been made available by means of eviction; or else it is a right to be found in the terms of the 5th section of the Act of 1874, which applies to the case of a railway title in whatever form the title may be, provided, I suppose, that there has been infeftment. I am inclined to think this later view is the more probable. I regret if it is so it was not made clear by at least a mention of the section.

Lord Johnston's opinion is quite easy to follow. That learned judge pronounces the conveyance in the present case to be a statutory conveyance under s. 80. That being so, he accepts the authority of the older cases—and I think not only accepts it as such but agrees with it on independent consideration—that in such a case, to use his own words, what the company obtains is "not a feudal title in the ordinary sense of that term, but a statutory title, fee simple in its nature, the feudal tenure being abolished while the feudal prestations are preserved and protected." And then, quoting the fasciculus of sections beginning with 107, he comes to the conclusion that until redemption or compensation the feudal prestations remain payable. In other words, he really rests the right to this action on the terms of s. 107.

My Lords, I confess I am quite unable to concur in the view held by the learned judges of the majority, that the question is solved by the consideration that the railway company hold the lands after they have taken them for a public statutory purpose, and that it is that fact which ties the superior's hands as to eviction; or, as it is expressed by their Lordships, that the only title a railway company has is "a statutory title." Such a statement to my mind really confounds the two uses of the word "title." In one sense a railway company has only a statutory title. It is a creature of statute, and can only hold lands or anything else for the purposes for which it is created. Any other use of what it has is ultra vires. In this sense its "title" is the special Act. But "title" has another meaning, namely, titulus transferendi dominii. "Title" in this sense flows from the person from whom the company acquires the lands, and is not the special Act. The measure of the particular right will be found in the instrument of conveyance, and cannot be found in the special Act. It is, therefore, in my judgment, absolutely necessary to consider, in a question with the superior, the title which the company gets from the vassal who held the lands before he conveyed them to the company. Further, I do not think it is at all to the point to cite the opinion (which I agree to be a sound one) that lands held by a railway company for the purposes of the undertaking cannot be adjudged for debt. That is a perfectly different proposition from holding that the moment there is transference to a railway company all powers of eviction are gone. The motto, assignatus utitur jure auctoris, is good here as elsewhere. The best proof of this is to be found in the Lands Clauses Act itself, in the elaborate provisions as to "mortgages." If lands conveyed by a person to a railway company are burdened by bond and disposition in security in ordinary form, with power of sale, then undoubtedly the company could get rid of the bond in the way pointed out in the Act; but if it did not do so, I think it perfectly clear that the creditor in the bond and disposition in security could operate sale, which is eviction. I have as little doubt that a superior could evict for payment of his dues, except only in so far as may be found on a perusal of the Lands Clauses Act, as that such

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action on his part is prohibited or made of no avail by some procedure authorized by the Act on the part of the company.

My Lords, I will revert to the general scheme of the Act; but before doing so, I think it may be convenient that I should state the grounds on which I think this particular case ought to be decided.

Whatever is the correct view of the effect of a conveyance made according to the provisions of s. 80 (which I shall for clearness' sake call a schedule-conveyance), it is, I think, quite clear that the effect of it is conditional upon the provisions of the section being strictly adhered to, and in particular, conditional upon the conveyance being registered within sixty days of its date in an appropriate Register of Sasines. This conveyance was not so registered, for it is impossible, in my view, to hold that "the last date thereof" means anything except the last date to be found on the face of the conveyance itself. Therefore, whatever may be the privileges of a schedule-conveyance, this conveyance did not obtain them.

The conveyance, however, was registered in a Register of Sasines, and this was in 1868, when registration of a conveyance in a Register of Sasines effected infeftment in virtue of the Conveyancing Act of 1858. Was this a conveyance which in form admitted of being so registered, so as to effect the result of infeftment? I think it was. In the words of Lord Kyllachy in the first *Inverness* case (1), "By that time the statutory form had become, under the Titles Act of 1858, undistinguishable practically from the new common law disposition, and all that was required to make a good common law title was that a warrant to register should be added, signed by the disponee or his agent; which warrant being recorded with the disposition, infeftment was duly constituted." That the appellants themselves at one time took this view may be inferred from the fact that the agent did adhibit to the conveyance a warrant for registration.

In short, I entirely agree with the Lord Ordinary in the view he has expressed. But I propose to carry on the matter with a little more explicitness than he has done, though in so doing I believe I am only expressing what he has left to be inferred.

(1) 20 R 551.

Being infeft in 1868, the company became entered in 1874, by force of the Conveyancing Act of that year. In 1885 Isaac Scott, the last entered vassal, died, and the lands fell into non-entry. But by s. 4, sub-s. 4, of the Act of 1874 no lands are henceforth to be "deemed to be in non-entry," and the superior is given the statutory action for payment of his casualty, not, however, a petitory action, but an action decree in which entitles the superior to possess the lands until the casualty is paid.

Now, in order to make clear what I think is the true view, let me suppose there was no 5th section in the Act. What would have been the result? The company or corporation would have been entered by virtue of s. 4, and on paying a year's rent, the composition due for the entry of a singular successor, no other composition would have ever become due. For nothing thereafter would ever have happened to make the lands fall into non-entry (although not to be "deemed" non-entry) and to open the way for the statutory action under s. 4. For be it observed that under the old law, although a superior could not be forced to enter a corporation, and could therefore make his own bargain as to the terms on which he was to grant a charter; yet if he did grant a charter on terms, however inadequate, he could not go back on it, for his only remedy was to withhold the charter. An illustration of how a superior might lose his remedy by granting an entry for an inadequate payment will be found in the decided case of *Lord Advocate* v. *Moray*. (1) The same thing will be found in the long series of cases dealing with the enfranchisement of taillied destinations. This would have been unfair to the superior, for he would have received a composition of only one year's rent for entering a vassal who would never die. Accordingly s. 5 was passed. That section practically imposes on the parties a bargain which under the old law they might or might not make, and to the same effect as if that bargain had been expressed in a clause in a charter of confirmation. What, however, is its effect as regards action? It enacts a direct liability: "Shall pay at the date at which the first composition would have been payable if this Act had not been

(1) (1894) 21 R. 553.

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passed, and every twenty-fifth year thereafter, a sum equal to what but for the passing of this Act would have been payable on the entry of a singular successor," i.e., when there was a taxed entry, the sum so taxed, otherwise a year's rent.

Now it seems to me that although the statutory form of action under s. 4 is the only form appropriate to the *first* payment, such payment being due because the lands are in non-entry through the death of the vassal (though deemed to be not in non-entry by force of the statute), yet when you come to the second payment, the warrant for which is only to be found in the direct obligation under s. 5 that the composition shall be payable at the end of every twenty-fifth year, then an ordinary petitory action such as we have here is the proper method of proceeding. I am therefore of opinion that the original judgment of the Lord Ordinary was not only the right judgment in the case, but was put upon the right grounds.

Though these considerations are sufficient for the decision of this case, yet in view of the discussion which has taken place, and of the really chaotic state to which the judgment of the First Division in this case has reduced the authorities, it is, I think, necessary to express an opinion on the statute as a whole.

Your Lordships are aware that I took part in the case of *Fraser*. (1) In that case, however, sitting in the First Division, I felt myself bound—I still think rightly—by the cases which had been decided in my own Division. Now, in all these cases the opinion had been expressed—and in the first *Inverness* case (2) as regards Smith's lands the opinion went to the root of the judgment—that a title if taken in the schedule form extinguished the relationship of superior and vassal. I therefore took that proposition for granted. But in your Lordships' House I am not only entitled, but I think bound, to consider the proposition on its own merits. My Lords, I do so with much reverence for the authority of the learned judges who laid it down; and I cannot for a moment accept the suggestion made in the judgment under review, that these learned judges must have overlooked the fact that a valid progress of titles in the hands of a disponer includes the necessity of showing that the lands are not in non-

(1) 1911 S. C. 145. (2) 20 R. 551.

entry. Such a lapsus is to my mind inconceivable on the part of Lord President Inglis, who had an unrivalled practical acquaintance with the law as it stood before 1845—not to mention the authority of Lords Adam and Kinnear. It is true that on the proposition Lord M'Laren differed, and Lord Kyllachy in the Outer House took it, as he was bound to do, as settled for him. Yet my respect for the authority is so great that if this were what I may call a pure feudal question I should bow to it, however great my doubts. It is, however, not really a purely feudal question. It is a question of statutory construction; and accordingly I feel bound to approach it to the best of my ability from that point of view.

My Lords, I said in *Fraser's Case* (1), and I venture to repeat it here, that the genesis of the 1845 Act is plain enough. It is a copy of the English Act of the same year, the copy being adapted to Scottish needs by a person with a very hazy notion of Scottish real property law. Indications of ignorance crop up all through the statute, in small things as well as great. What, for instance, is the sense of heading a set of sections "Lands in Mortgage"? There were no mortgages in Scotland; and in the enumeration which follows, while wadset, which by 1845 was practically extinct, is mentioned, no mention by name is made of the bond and disposition in security, which had really become the ruling form of heritable security. Yet, notwithstanding all this, the scheme seems clear enough. The Act begins by authorizing the acquirement of land by voluntary agreement, and confers on those who, by reason of non-age or limitation of title (e.g., entail), would be unable to enter into agreements, power so to do. It then provides the methods for compulsory taking in the case of those who will not agree, and deals with the application of compensation money, and then it comes to the heading "Conveyances," and proceeds to enact s. 80. Now, up to this time no one is, so to speak, thinking of the superior. And the reason is, as I stated at the beginning, that, although on a sound view of the feudal system as developed in Scotland, the superior was truly the dominus of the land, subject to the dominium utile being in the vassal, yet in the view of the framer of this statute

(1) 1911 S C. 145.

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the vassal alone was the owner, and the superior was a creditor-incumbrancer in respect of the feu duty and of the casualties.

Now the general purpose of s. 80 is, I think, clear enough. The framer wished to give a form of conveyance which should be simpler than the common law conveyance, and which if taken advantage of should secure the company in possession of the lands without more ado. He did not advert to the fact that according to the law of Scotland a complete title could not be given without the interposition of the superior. But the words used being of statutory effect must be construed, and the question therefore came to be, What sort of title is it which is in the words of the Act "A good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking and their successors and assigns . . . . any law or custom to the contrary notwithstanding"?

There seem three suggested interpretations to be considered.

It was argued by Mr. Murray that the meaning of the words was just such a title as a disponer would naturally give, i.e., that the schedule form duly registered must be considered as the equivalent of an ordinary disposition with an a me vel de me holding containing procuratory and precept, and followed by infeftment. If that were so then the schedule conveyance is only an ordinary conveyance in other form—and the relation of the superior to it is the same as his relation to common law dispositions. He can get his feu duty by personal action or (till the passing of the Protection of Rolling Stock Act) by poinding of the ground; and when the lands fall into non-entry he has his declarator of non-entry to force an entry.

I have mentioned this suggestion as it is due to the very able argument with which your Lordships were favoured, but I confess that the objections to it seem to me unanswerable. It gives no value to the word "complete," for it is not in itself a complete title; it only becomes so when it is used to obtain a complete title by the intervention of the superior. Further, it does not square with what we find in s. 74. That section deals with refusal to convey, and provides that on deposit of the purchase and compensation money the promoters may expede a notarial instrument containing a description of the lands and

also other particulars, and "thereupon all the estate and interest in such lands of or capable of being sold and conveyed by the party between whom and the promoters such agreement shall have been come to or compensation shall have been obtained . . . . shall vest absolutely in the promoters of the undertaking, and such instrument being registered in the Register of Sasines in manner hereinafter provided in regard to conveyances of lands, shall have the same effect as a conveyance so registered."

Now a disposition with an a me vel de me holding, followed by infeftment on the indefinite precept, does, until that infeftment becomes public by confirmation, leave a mid-superiority which is an estate and interest in the lands in the person of the disponer. In other words, it fails to satisfy the condition of vesting absolutely in the disponee all the estate and interest which was capable of being conveyed by the disponer.

The next suggestion is the one that was adopted by Lord President Inglis and Lords Adam and Kinnear in the *Elgin* (1) and first *Inverness* (2) cases, and that is expressed by Lord Kinnear in a single sentence, thus (3): "A title which is not good against the superior is not a complete or valid title, and when the statute says that the registration of the conveyance to which the superior is no party shall constitute an undoubted right and complete and valid feudal title, I think it means a title which shall be good against the superior and against all the world."

The development of this argument is that, as the title is to be a good title against the superior, and without his intervention, his estate of superiority is swept away; for there is now a person with unassailable title to the land in question who has never become his vassal or derived title from him.

I shall deal presently with the objections to this view which have been urged by Lord Skerrington.

There is, however, one other suggestion which I feel bound to make, because I admit it is the one which, if I had to approach the question for the first time, would most commend itself to my mind. It is to hold that the effect of the schedule title duly

(1) 11 R. 950. (2) 20 R. 551.
(3) 20 R. at p. 567.

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registered is to give the company, by force of statute, a public infeftment. In other words, it is no more than a forecast of what was in the matter of common law titles afterwards effected by the Act of 1874.

This idea is not really so much before its time as might appear at first sight. In the year 1838 there was published the Report of the Royal Commission on Conveyancing, under the chairmanship of George Joseph Bell, and in the forefront of the recommendations (which will be found in Duff's Feudal Conveyancing, p. 520, paragraph 9—p. 521) stands that of effecting entry without the personal intervention of the superior by Charter of Progress. This solution at least gives full effect to the words "complete" and "feudal"—it squares with the idea of the complete divestiture of the granter and the giving to the company the exact estate held by the granter, as shown by s. 74—and it is consonant to the express declaration of the inviolability of the superiority in s. 126.

Let us now see how these two suggestions will fit with the remaining portions of the statute.

I revert to the Act and begin after s. 80. After dealing with entry on lands, intersected lands, and common lands, it comes to the heading "Lands in Mortgage." This, notwithstanding the inaccuracy of its title, then proceeds to deal with lands which are subject to any security of the kind which can be paid off at the will of the owner of the lands under burden of the security. Sect. 99 clearly envisages the possibility of lands being conveyed under the burden of the existing securities, and it and the following sections make clear provision for the company getting rid of the burden. But there is no compulsitor on the company to do so; and if they do not, it is, I think, quite clear that the security-holder would have his ordinary remedies, for the statute gives him no others. It is these sections that, to my mind, demonstrate the unsoundness of the view which Lord Skerrington has put in the forefront of his opinion, namely, that the protection against eviction rests on the special Act alone.

Having finished with lands under burdens which can be paid off at the will (though there may be a time bargain) of the

burdened proprietor, the Act next proceeds to deal with the case of lands which are affected with permanent burdens, under the heading "Lands subject to Rentcharges, &c." Had this been kept to such things as rent-charges, ground annuals, and other real burdens, all would have been well. Had the adapter understood his business he would for the superior have had a separate set of clauses corresponding analogously to the set of clauses which deal with copyhold tenure in the Act he was adapting—copyhold tenure being, as your Lordships are well aware, the form of tenure in England which is most analogous to the feudal forms of Scotland. But unfortunately he was permeated by the idea that, as I have already expressed it, the superior was the creditor-incumbrancer for his feu duties and his casualties, and accordingly the superior's rights are dealt with under this fasciculus of sections. Yet again, though faulty in conception and expression, the scheme is clear. It is intended that he shall be paid off and that his pecuniary claims disappear. The right of the superior to be paid off is given by the concluding words of s. 107, and the right of the company to get rid of the superior by ss. 108 and 110. But though this paying off may be insisted on by either party—the amount to be paid, if not agreed on, being, as in all other cases, to be settled by arbitration—it is not made obligatory, and till he has been paid off things are to go on as they were, that is to say, the company is to pay the annual or recurring payments when due (s. 107). It is, I think, quite permissible to read s. 107 as giving action to the superior to force the company to pay if it continues to occupy. It is a condition of the company remaining in possession (not having paid compensation to the superior) that the company should pay to the superior the recurring payments. That is tantamount to giving a petitory action for the payments which would have been exigible if matters had remained as they were, i.e., if the schedule title had not operated as a schedule title.

It will be observed that when I say the superior it does not matter whether he is still in the feudal sense a proper superior with a vassal entered to him nolenti volenti, as would be the case under my suggestion; or whether he is what I may call the quondam superior under Lord President Inglis's view. For the

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Lord President clearly laid it down in the *Elgin* case (1) that s. 107 applies when a schedule title has been taken and imposes a liability on the company to pay recurring charges, till compensation is paid, and total redemption effected. I say a schedule title, for it is evident that if a common law title is taken the superior will have his ordinary remedies. In other words, s. 107 in the case of a common law title is only needed in so far as it gives the superior the right to call for redemption—it is not necessary so far as giving action for the recurring payments before redemption is effected.

Reverting then to the petitory action given by s. 107 in the case of the schedule title, it suits very well in the case of feu duty. Feu duty is a liquidated sum due at specific periods. It can be sued for by ordinary petitory action, and it could be enforced (inter alia) by poinding of the ground until that remedy, in the case of railways, was interfered with by the specific statutory provisions of the Protection of Rolling Stock Act, which, however, was not passed till the year 1867. But when you come to the consideration of the composition due on the entry of a corporation, then you get a state of affairs which the provisions of the statute are not adapted to fit.

I am not taking a narrow view of the section itself, though if the words were taken strictly there would be an end of the matter. For the preamble bears, "With respect to any lands which shall be charged with any . . . . casualty of superiority." Now the lands never were charged with the casualty of composition. It is there that composition differs from relief in its nature, apart from its amount. And the reason is the historical one, that in real truth and strictness composition is not a feudal casualty at all. I do not propose to detain your Lordships by a history of composition. I refer for that to the leading case of *Cockburn Ross*, decided in 1815 and affirmed by your Lordships' House (2), or if something rather shorter may be referred to, I would beg to be allowed to do so to my own judgment in *Governors of Heriot's Trust* v. *Paton's Trustees* (3), a judgment which was agreed to by six other judges, and which I believe sets forth the

(1) 11 R. 950.
(2) F. C. June 6, 1915; (1820) 2 Ross's L. C. 193.
(3) 1912 S. C. 1123.

matter with historical accuracy. Notwithstanding all this, I am content to interpret "recurring payment when due" as including composition.

Now, if the case were the entry of an ordinary individual, it would be easy. But it is not; the entry is the entry of a corporation. This at least seems certain, that s. 107 contemplates the payment of the requisition of a known sum as liquidated debt. There is no provision in s. 107 for an arbitration. Now, no man can tell what is the composition due on the entry of a corporation, a corporation being a vassal which a superior could not be forced to receive, for that was a matter of bargain and the bargains varied.

It is absolutely necessary here for the moment to exclude from one's ideas the 5th section of the Act of 1874, for the interpretation of the statute of 1845 must be sought as at its date. The application of the subsequent statute of 1874 to it is another matter, but clearly the Act of 1845 cannot be interpreted in the light of the state of affairs in 1874.

As I have said, the composition payable was a matter of bargain, and varied. Sometimes it was a slump sum greater than one year's rent. See for an instance of this *Campbell* v. *Orphan Hospital.* (1) Sometimes a life of a third party was taken, and it was stipulated that another casualty should be paid on the determination of that life. Sometimes a bargain was made for a casualty to recur at a fixed period of years—such as the bargain which was subsequently embodied in the 1874 Act. But the point is that it was always bargain—a payment on one side and a charter on the other. And if parties could not agree, the matter worked out in this way. The superior could not be forced to accept a composition. And he had his declarator of non-entry which would admit him to possession of the lands. If, therefore, no terms could be come to, the corporation's remedy was either to find the heir of the deceased and put him forward, in which case the superior had to enter him for relief duty; or, if that could not be done, then to dispone to an individual as trustee for the corporation, in which case the superior could be compelled to enter that individual on payment of the usual

(1) (1843) 5 D. 1273.

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year's rent, with the certainty of getting another composition when that individual died and the lands again fell into non-entry; unless his heir could be found and put forward, in which case the superior would only get relief.

It is therefore clear to my mind that from 1845 to 1874 there was no petitory action possible for the superior against a corporation in respect of composition founded on s. 107. On the other hand, the parties could come to terms if they chose; but if they did not, what then? The superior had no longer a declarator of non-entry. He had not in Lord President Inglis's view because he was no longer a superior; he had not in my view because the fee was full by operation of statute. In both views his only remedy was to call on the company to redeem.

But then eventually came the Act of 1874. I think that Act in this matter did two things. It not only made obligatory the reception of a corporation as a vassal of a superior, because it allows the vassal corporation to get an entry by the mere fact of registering the disposition in its favour, but it also made for both parties in all cases the bargain which prior to that it was in their own hands to fix. After that Act was passed it became, in my view, possible to say what was the composition which a corporation was bound to pay, just as after the Act of 20 Geo. 2, c. 50, it became possible to say what composition was payable by an ordinary singular successor. In other words, the composition due in the case of a corporation became just as certain as in the case of an ordinary individual, and capable therefore of being sued for just as a feu duty might be sued for in respect of the condition expressed in s. 107.

I have discussed s. 107 upon the assumption that the whole lands held by the vassal under the superior are taken. That, however, is not the common case; indeed, it will only happen practically in towns. In the long stretches of line through the country it is only a strip which is taken, which could never coincide with the totality of the lands held from the superior. It is not wonderful, therefore, that the statute goes on to deal with such cases in s. 109. Here again, however, the procedure is not absolutely obligatory, though obviously intended. The

matter, however, is not left to stand on this fasciculus of clauses, for we find the detached s. 126.

Now s. 126 is doubtless a blundered section, but still, so far, it is explicit.

The first clause expressly reserves the superiority, but when we come to the second clause, this is so explicit that I do not think it can be disregarded, and it abolishes, in the case to which it applies, all rights of the superior to both feu duty and casualties. There is no room here for the application of s. 107.

As regards the second clause I am following what was actually decided in the case of *Elgin*. (1) The only difference so far as this section is concerned is that if my suggestion be adopted the first clause may be taken as it stands (subject to the blunder of the words "in the person granting such titles"), while the other interpretation necessitates the view that it is totally blundered, or at least unnecessary, being with the object of conserving the franchise to Crown vassals.

What is the result? If it is worth the while of the proprietor of the remaining lands he can get an apportionment under s. 109 so as to reduce the burden which would otherwise entirely fall on him, and if he does so the superior can claim compensation for the amount of the apportioned piece which effeired to the land taken, and which has as a burden been extinguished by the section. If an apportionment would be so infinitesimal as to be worth nothing—as would obviously be the case of, e.g., a small strip taken for the West Highland Railway through the Breadalbane estates—then matters remain as they were, the superior getting his feu duty and casualty out of the lands that remain.

I now revert to the criticisms which are made by Lord Skerrington on Lord President Inglis's view of the 80th section. They are mainly two, and I do not think either of them are fatal. The first is that the view contradicts the word "feudal." Now, if "feudal" necessarily connotes a feudal holding with all the feudal incidents, that is so. But the word "feudal" may well be loosely used to express as in fee, absolute property, as opposed to any more limited kind of right.

The second is that it is not easily conceivable that the statute

(1) 11 R. 950.

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should introduce an allodial tenure. But the introduction of an allodial tenure, i.e., an allodial tenure which is not that of the udal lands of Orkney and Shetland, is neither impossible—for a statute to which the Crown is a party can do anything—nor is this a unique example. There is first the case of the original glebe lands (Stair, 2, 3, 40), and another instance may be found in quite a modern Act, namely, the Burgh Police Act of 1892: see the case of *Young's Trustees* v. *Grainger*. (1)

Let me now restate the situation. All are agreed that where only parts of the lands are taken s. 126 rules the position—the superior can have compensation, but he can never sue for a feu duty or a composition. When the whole lands are taken, then, in the case of schedule titles since 1874, until compensation is demanded and paid, or offered and paid, there is in virtue of s. 107 a direct action for feu duty and for composition, and that whether the view taken by Lord President Inglis or myself is preferred. Before 1874 in the same position there was an action for feu duty but not for composition, and that again whichever view is taken. It seems to me, therefore, quite academic to settle which is the better view, though I have thought it right to express mine in order to prevent some future judge discovering it for the first time.

I think the appeal falls to be dismissed with costs. There can be no real hardship, for the company has it always in its power to put an end to the whole matter, not to speak of what may be the effect of the provisions of the Act of Parliament of last year, which provides for the abolition of casualties altogether.

LORD ATKINSON. My Lords, I have had the pleasure and the advantage of reading the two judgments which have just been delivered by my two noble and learned friends as well as that which is about to be delivered by my noble and learned friend Lord Parmoor. I agree in omnibus with the judgment of the Lord Chancellor, and in so far as the two other judgments differ from his I feel myself obliged to dissent from them. I wish, however, to state expressly that in my opinion where all the land of a vassal is conveyed to a statutory corporation such

(1) (1904) 7 F. 232.

as a railway company, by an instrument which satisfies all the requirements of s. 80 of the Lands Clauses (Scotland) Act, 1845, all superiorities in that land up to that of the Crown are terminated and cease any longer to exist; and that where only part of the vassal's lands are conveyed to such a company by a similar conveyance all similar superiorities in the part conveyed in like manner cease to exist. The words of ss. 80 and 126 are, I think, too strong to admit of any other construction. I wish, in addition, to express my dissent from the proposition that a railway company acquires a statutory title, if by that phrase is meant a title such as is described in s. 80, whatever may be the nature of the conveyance by which the disponer conveys his land to them. In my view that proposition confounds the power given to the company by statute to acquire lands with the means by which that power is executed. These are wholly distinct and different things. If a railway company should choose to take from its disponer an ordinary common law conveyance of the land conveyed to it, that instrument has, I think, no greater potency in itself, in their case, than it would have in the case of any other disponee who took a similar conveyance, and does not invest the company with the special right and title described in s. 80.

My Lords, I wish further to say that I dissent from the proposition that s. 107 applies to a casualty, the liability to pay which immediately, or at some future date, or on some given event, does not exist at the time that the land of the vassal is acquired, and can only be brought into being by a bargain which a superior may make with the disponee, but which he has not made and can never be compelled to make.

As your Lordships all agree in the ultimate result brought about by the operation of the Act of 1874 on the established facts of this case, this appeal will of course be dismissed with costs.

Lord Parmoor. My Lords, this is a petitory action in which the respondents seek to recover from the appellants the amount due as on a casualty of composition. The case raises important points on the construction of certain sections of the Lands Clauses Consolidation (Scotland) Act, 1845.

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The appellants purchased under their statutory powers the whole subjects held by Isaac Scott of the respondents by a conveyance dated August 12, 1867. This conveyance was not delivered until May 15, 1868, and on that date was registered in the Register of Sasines. It does not appear, and in my opinion it is not material, whether the transaction was carried out by agreement or under compulsory process. It is sufficient that the subjects came within the area over which the powers of compulsory purchase extend. On the death of Isaac Scott, the appellants, on October 26, 1885, paid the sum of 479*l.* to the respondents, being a year's rent of the subjects at that date as adjusted between the parties. A receipt was given declaring "that the next casualty shall be payable and exigible on the 26th October 1910."

The respondents have also claimed and regularly received from the appellants the sum of 1*s.* 3*d.* per annum since Whitsunday, 1868, on account of feu duty. In the present action the respondents claim as on a casualty of composition a year's rent of the subjects on October 26, 1910. In my opinion the respondents rightly claimed and received the sum of 479*l.* in 1885, and the annual sum of 1*s.* 3*d.*, and are entitled to succeed in the present action. I do not base this opinion on the transaction of 1885, and the whole question is open on the present appeal.

This appeal depends on the application of certain sections of the Lands Clauses Consolidation (Scotland) Act, 1845, to the system of land tenure prevalent in Scotland. There has been a difference of judicial opinion in Scotland as to whether the statutory tenure of the purchasing company under the Act is a feudal tenure from a superior. In the present case the Lord President and Lord Skerrington adopt a different view from Lord Johnston. For reasons given hereafter, I agree in this respect with Lord Johnston, but I think that there would be the same result whether the statutory tenure is feudal or not. The reason of this is that where lands in Scotland have been purchased and taken by the purchasing company, the statutory rights of the superior depend, not on s. 80, but on the fasciculus of sections 107 to 111 and s. 126. In construing the relevant

sections it is necessary to keep in mind the general scope and purpose of the Act. The purchasing company acquire the dominium utile of the vassal, whereas the rights of the superior are subject to redemption or compensation, and finally cease or are extinguished. The owner, from whom the purchasing company acquire lands, and who is entitled to receive a notice to treat, is defined to mean "any person or corporation or trustees or others who under the provisions of this or the special Act would be enabled to sell and convey lands to the promoters of the undertaking." An owner within this definition is the vassal and not the superior. The provisions relating to the form of feus and conveyances apply only to feus and conveyances between the vassal as disponer and the purchasing company as disponee.

Apart from any special conditions or arrangements, which do not exist in the present case, the feu or conveyance from the vassal to the purchasing company is outside the power and control of the superior, and completed without any notice to him. When a feu or conveyance is completed the purchasing company hold by statutory tenure all the estate and interest in lands of, or capable of being sold or conveyed by, the party between whom and the purchasing company an agreement has been made, or purchase-money or compensation has been determined, and this estate and interest vests absolutely in the purchasing company (s. 74). The superior, as distinct from the vassal, is not entitled to a notice to treat, and his rights are not the subject of purchase under the Act. He is in the position of a person whose rights have been injuriously affected, and until he has been compensated, it is equitable that he should be paid the same amount as he would have received for feu duty or casualty of superiority before the purchasing company had become infeft in or had entered upon the purchased lands. There is no doubt as to the conditions necessary to found a claim for compensation for injury to any right occasioned by the exercise of statutory powers under an expropriation Act incorporating the Lands Clauses Consolidation (Scotland) Act, 1845. The loss, for which compensation is claimed, must result from an act made lawful by the statute, and such as would have been actionable but for the statute. In other words,

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the claim for compensation is an alternative for a right of action made incompetent, when the act, which occasions the loss, has been legalized. The loss must be injury to an interest in land, and not merely a personal loss or injury to trade, and must be consequent on the construction of the authorized works as distinct from their user.

All these conditions co-exist in the case of the interest of a superior. Before the feu or conveyance of the dominium utile to the purchasing company, he could have enforced his right to feudal prestations by a competent form of action. If the effect of the feu or conveyance to the purchasing company is to deprive the superior of a competent form of action, the alternative remedy provided by the statute comes into force. The statute authorizes him to call upon the purchasing company to redeem his interest in the lands purchased or to pay compensation, and, until the redemption, places upon the purchasing company an obligation to pay the annual, or recurring, amounts which he was entitled to receive had the old conditions of tenure not been changed. Whether the feudal prestations exist as such until redemption is an issue in the present case, but I should come to the same conclusion whether I adopted the reasoning of Lord Johnston, or of the Lord President and Lord Skerrington.

Sect. 20, and the subsequent sections, which supply the machinery for ascertaining the value of lands or of any interest therein, if no agreement is come to between the purchasing company and the owners, are made applicable to the case of a superior whose interests in lands have been injuriously affected by the terms of the special Act and the incorporated Acts. There is no difficulty under this head, and it is not necessary to refer to any further sections before s. 80.

Sect. 80 provides three forms of feu or conveyance in favour of the purchasing company which may be optionally adopted. I have no doubt that outside any form sanctioned by the statute it is open to the parties to use the ordinary common law form of feudal conveyance, but the difficulty in the way of the appellants is to show that the statutory rights of the superior under the relevant sections are in any way affected by the form of conveyance, or that the purchasing company can have any

other than a statutory tenure. The first form of feu or conveyance under s. 80 is that contained in Scheds. A and B, or as near thereto as the circumstances of the case admit. This form requires to be registered in the General Register of Sasines at Edinburgh within sixty days from the last date thereof, and when registered gives and constitutes a good and undoubted right, and complete and valid feudal title in all time coming to the purchasing company, their successors and assignees, any law or custom to the contrary notwithstanding.

A second form is contained in the proviso which makes it unnecessary for the purchasing company to record in any Register of Sasines any feu or conveyance in their favour which shall contain a procuratory of resignation or precept of sasine, or which may be completed by infeftment, and so long as such feu or conveyance is not recorded in a Register of Sasines it is regulated by the ordinary law of Scotland. This form was appropriately referred to by Mr. Clyde as a common law form of conveyance.

A third form is the recording of the second form in the Register of Sasines. In the argument of Mr. Clyde much reliance was placed on the form of conveyance as affecting the rights of the superior under s. 107. On this point I agree with the forcible argument of Mr. Murray, that the form of feu or conveyance only regulates the relationship of the vassal as disponer and of the purchasing company as disponee, and does not affect the statutory rights of the superior.

The first question which arises on s. 80 is whether the conveyance was registered within sixty days of the last date thereof. This condition was not complied with unless the date referred to is the date of delivery as distinct from the date of signature. I can find no sanction for any such interpretation under Scottish law, and see no way of avoiding the conclusion that, where a special form of statutory conveyance is provided, which was not known to the common law, such conveyance must comply with the attached statutory conditions, one of which is the registration of the conveyance within sixty days of the last date thereof. On this point I agree with the opinion of the Lord Ordinary, but having regard to the wide scope of the argument, it

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would be unsatisfactory to rest an opinion on this narrow foundation.

The phrase "shall give and constitute a good and undoubted right and complete and valid feudal title in all time coming . . . . any law or custom to the contrary notwithstanding" has given rise to a difference of judicial opinion. Apart from authority, I should not have construed this phrase as constituting the feudal relationship under the statutory tenure, since this relationship is not consistent with the right conferred by s. 74 on a purchasing company who have entered upon and are in possession of lands, in execution of works of public utility.

There is, however, a preponderating weight of authority that under the statutory form of conveyance the purchasing company holds by force of the statute and not by tenure under a superior. But for the judgments of the Lord President and Lord Skerrington in the present case I should have held that the matter was no longer open to discussion in the Court of Session. Lord Kinnear expresses the position in precise language in *Magistrates of Inverness* v. *Highland Ry. Co.* (1): "The effect of the statutory title is quite settled. The railway company has a complete and valid title to the lands, and it holds by force of this statute, and not by tenure under a superior." Lord Johnston says in the present case, "I have no hesitation in concluding that the company never were, by their recorded conveyance and the effect of the Conveyancing Act, 1874, impliedly entered with the Heriot Trust, as their superior."

If this statutory form of conveyance and the words "complete and valid feudal title in all time coming" do not constitute a tenure under the superior, I am unable to follow the argument that it would make a difference if the common law form of conveyance was used. The same general arguments apply, and there is no longer the difficulty which the special words, relating to feudal tenure, introduce. It comes back to the same point, that whatever may be the form of conveyance the rights of the superior are now regulated by the statute.

The next sections to consider are ss. 107 to 111. These

(1) 1909 S. C. 943, at p. 949.

sections define the position and rights of a superior where lands are taken by a purchasing company within the area over which their compulsory powers extend, and, except so far as they may be modified by s. 126, determine the rights as between the appellants and respondents. Their general object is to provide a money equivalent to the superior for the loss of his feudal prestations, so soon as the statutory tenure has taken the place of the feudal tenure. The heading of the section is important. The draftsman includes feu duties and casualties of superiority within the category "charge," and as annual or recurring payments. A casualty of superiority is not, in the ordinary sense, a charge, and may only be a sum ascertainable by bargain at some future date. This, however, is no reason why, for convenience of drafting, a general definition should not be used, and there is no resulting confusion in the subsequent sections. The words "feu duties" and "casualty of superiority," under the heading, apply to the conditions as they existed in the old feudal tenure before the purchasing company had put into force its powers of purchase and acquired a statutory title. In the subsequent section these feudal prestations are transmuted into a money payment.

It was argued on behalf of the appellants that a limitation should be placed on the terms of s. 107, which does not apply to ss. 108 to 111. I am unable to follow this argument, or to see how it can be made consistent with the words of the section, which is one of a series all dealing with the same subject-matter. It would be less difficult to understand the argument of Mr. Clyde if he had said that none of the sections 107 to 111 are applicable to a statutory form of conveyance, but, for good reasons, he refrained from pushing his argument to this extent. Sect. 107 authorizes the purchasing company to enter upon and continue in possession of land purchased by them without redeeming the feu duty or casualty of superiority thereon, provided they pay the amount of such feu duty or casualty of superiority as a recurring payment, when due, and otherwise fulfil all obligations accordingly, and provided the company shall not be called upon by the superior to redeem the same.

A more difficult question is whether a petitory action is a

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competent remedy, where the corporation have not paid the amount of the feu duty or casualty as a recurring payment, and there has not been redemption or compensation. I speak with much hesitation on this point. My difficulty is to appreciate how the tenure, under which the corporation hold, affects the question of a liability which arises in reference to the conditions as they existed before compulsory process had been put in force and the corporation had entered upon, or had completed title. It is, however, unnecessary to further consider this point of procedure, since I agree with Lord Dunedin that if the difficulty did exist up to 1874 it is met in the terms of the Conveyancing Act of that year.

Mr. Clyde also relied in support of his argument on the words "all obligations accordingly." These words do not, in my opinion, present any difficulty. They direct that until redemption the obligations, if any, of the feudal relationship shall be duly fulfilled according to the old conditions of tenure. In the present case no such obligations were referred to in argument, nor were any such sought to be enforced in the action.

Sect. 108 provides that in case of a difference arising in the settlement of compensation in reference to the subjects comprised in s. 107, such difference shall be determined as in other cases of disputed compensation; that is to say, under s. 20 and the following relevant sections. Sect. 109 provides for apportionment, and in certain cases places the whole charge on the remaining lands if their security is sufficient. Sect. 110 stands in contrast to s. 74. Under s. 74, on payment or deposit of the purchase-money or compensation, all the estate and interest of the vassal vests absolutely in the purchasing company, and there is a transmission of title. Under s. 110 there is no vesting of property and no transmission of title, but on payment or tender of the compensation, or on deposit of the amount in the bank, or by executing an instrument under the hand of the notary public, the feu duty and casualty of superiority (inter alia), or the portion thereof in respect whereof such compensation shall so have been paid, ceases and is extinguished.

Mr. Murray based a very forcible argument on the latter words of s. 110, as showing that the feudal relationship and the feudal

prestations did not cease and were not extinguished until the conditions in the latter part of the section had been complied with, and that up to that point at least the tenure under the statute was a tenure from a superior.

I think that the feudal prestations are kept alive as a basis on which to estimate the amount of recurring payments or of the final redemption or compensation, but this does not change the nature of the tenure. On this point I have already expressed my concurrence with the view taken by Lord Kinnear and Lord Johnston.

The only remaining section to which it is necessary to refer is s. 126. The first part of this section has for its object to preserve certain superiority franchises. On this point there is the authority of Lord President Inglis in the *Monklands Case* (1) and of Lord Chancellor Hatherley in *Inspector of Poor of St. Vigeans* v. *Scottish North Eastern Ry. Co.* (2) The second portion of the section is closely connected with the first. It appears to have been apprehended that the maintenance of a right to superiority franchises might be construed as involving the maintenance of a right to feu duties and casualties where the land which was taken was part or portion of other lands held by the same owner and under the same titles. It is enacted that in this case the purchasing company shall not be liable for feu duties or casualties or bound to enter with the superiors. So far the section is in accord with the general principle of the Act, which substitutes a tenure under the statute for tenure from a superior. The proviso at the end is in form general, and applies to any lands, whether the whole are subject of the same title or whether they are a part or portion only of the lands held by the same owner under the same titles. It enacts that before entering into possession of purchased lands the purchasing company shall make full compensation to the superiors for all loss which they may sustain by being deprived of any casualties or otherwise by means of any procedure under the Act.

This does not mean that a superior cannot claim any remedy after entry into possession, but that he is entitled to claim the compensation before entry into possession if he insists on his

(1) 2 Macph. 519. (2) 8 Macph. (H. L.) 53.

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rights. This proviso was probably inserted ex abundanti cautela, but it does no more than state in different language a right which the superior has under s. 107. Under this section the purchasing company cannot enter into possession of purchased lands without redeeming the charges thereon if they are called upon by the party entitled to the payment of feu duties or casualties to redeem the same. Assuming that either redemption or compensation falls to be assessed at the same time, that is to say, before entry upon the land by the purchasing company, I think it is obvious that the superior should receive precisely the same amount under either s. 107 or s. 126. The computation in either case would be made on the same data and the application of the same principles. The same initial figure would be the basis either of redemption or compensation, and the capitalization would be in either case computed on the same table, since the security on which the superior holds his rights is wholly unaffected whether redemption or compensation is applied in fixing the payment to be made as a condition of the discharge.

My Lords, I do not propose to attempt to analyse in any detail the judgments given in the former cases to which special reference is made. I have read and re-read these judgments several times. No doubt there is difference of opinion, but there appears to me to be a preponderance of authority in support of the following propositions, which suffice to determine this appeal in favour of the respondents :—

That the purchasing company, whatever may be the form of feu or conveyance, holds subject to the statute ; that the rights of the superior are independent of the feu or conveyance from the vassal as disponer to the purchasing company as disponee, and depend on the terms of the statute ; that ss. 107 to 111 provide the general code under which a superior, whose rights have been injuriously affected, is compensated for his loss ; that all these sections refer to the same subject-matter, and that there is no warrant to make an exception in the case of 107 ; that there is no inconsistency between the general scheme of redemption under ss. 107 to 111 and the proviso to s. 126 ; that until the payment of redemption or compensation the superior can claim as a money payment a sum calculated as equivalent to what he

would have received from his feudal prestations if there had been no expropriation of the dominium utile of the vassal under statutory powers.

My Lords, in my opinion the appeal should be dismissed.

Interlocutors of the Lord Ordinary and of the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, March 25, 1915.

Agents for appellants: *Grahames, Currey & Spens, for Hugh R. Buchanan, S.S.C., Glasgow, and Hope, Todd & Kirk, W.S., Edinburgh.*

Agent for respondents: *John Kennedy, W.S., for Peter Macnaughton, S.S.C., Edinburgh.*

[PRIVY COUNCIL.]

J. C.* 1915 July 1, 6, 20.

W. GARDINER & CO., LIMITED . . . . APPELLANTS;

AND

DÈSSAIX AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Construction—Gift to Children—To remain in Testator's Family—Not to be mortgaged—Fee Simple.

A testator by his will gave his property to trustees, and provided: "as to my houses and property in the city of Sydney I direct that the same shall not be disposed of, mortgaged or encumbered in any way whatsoever, but shall remain for the benefit of my wife and children free from the control of their respective husbands and wives, so that the same shall remain in my family from time to time for ever hereafter, the rents and proceeds arising out of the said property to be equally divided between my said children" (naming seven children), "also my said wife Mary Erwin, for her life use only, and after her death same to revert back and her share to be equally divided among my aforesaid children or the issue thereof respectively."

The testator was survived by his wife and the seven children named; at the date of the will there was living another child of the testator by a former marriage:—

Held, that the seven children took estates in fee simple and not in fee tail.

APPEAL from an order of the Supreme Court of New South Wales in its equitable jurisdiction (November 3, 1913) upon a question of law set down for argument.

By his will, dated August 6, 1866, Patrick Erwin gave his property to trustees upon the trusts therein stated. With regard to his houses and property in the city of Sydney he made a disposition in favour of seven named children and his wife, Mary Erwin, in the terms which are set out in the head-note.

The testator died on November 12, 1886, leaving him surviving his wife, Mary Erwin, and the seven children above referred to. At the date of the will there was living another child of the testator by a former marriage.

* *Present:* VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

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The appellants were in possession of part of the testator's property in Sydney and claimed title thereto under a deed of partition executed in 1877 by the testator's wife and the seven children referred to. This deed was on the basis that the seven children took estates in fee simple under the will. In August, 1913, a suit was commenced in the Supreme Court by, amongst others, the respondents P. H. Dessaix and A. G. Dessaix, as trustees under the will, against the appellants and others for certain relief upon the footing that, upon the true construction of the will, the interests given to the seven children in Sydney were interests in fee tail. The defendants pleaded that, upon the proper construction of the will, the seven children took absolute interests in fee simple.

By an order, by consent, the question whether, upon the true construction of the will, the said interests were interests in fee simple or in fee tail was ordered to be set down for argument and disposed of before the other questions in the suit.

On November 3, 1913, the Chief Judge in Equity (Simpson J.) made an order declaring that the seven children took under the will interests in fee tail. The learned judge was of opinion that the general tenor of the will was more in accordance with that view than that there was a gift in fee simple.

Upjohn, K.C., and *Vernon*, for the appellants. Upon the true construction of the will the seven children took absolute estates in fee simple. In order to create an estate tail there must be both words of inheritance and of procreation. The words in the will directing that the property should remain in the testator's family are not words of procreation relatively to the children named. The restraint upon anticipation does not limit the interest to an estate in fee tail: *Foxwell* v. *Van Grutten*. (1) The gift of the rents to the children prima facie gave them the fee simple, and there is nothing in the will which shows an intention to cut down that estate. [*Bowen* v. *Lewis* (2) was referred to.]

H. E. Wright and *J. H. Stamp*, for the respondents. The will taken as a whole shows an intention to create estates tail. In a will no technical words are necessary for that purpose.

(1) [1897] A. C. 658. (2) (1881) 9 App. Cas. 890.

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There are three features of the will which indicate the above intention: (1.) the direction against mortgaging, (2.) the provision that the property should remain in the testator's family, and (3.) the provision that the wife's interest should revert to the children and their issue: *Crumpe* v. *Crumpe* (1); *Hannaford* v. *Hannaford* (2); *Lucas* v. *Goldsmid* (3); *In re Simcoe.* (4) The way in which the law may operate upon estates by enabling entails to be cut off, or in other respects, is to be disregarded in construing wills: *Allgood* v. *Blaker.* (5) In *Foxwell* v. *Van Grutten* (6) the words "heirs and assigns," the strongest words to create an estate in fee, were used. [*Roddy* v. *Fitzgerald* (7), *Harris* v. *Davis* (8), *Parkin* v. *Knight* (9), and the Statute de Donis (13 Edw. 1, c. 1) were also referred to.]

Vernon replied.

1915
July 20.

The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. In this case their Lordships have come to the conclusion that the children of the testator interested under the gift contained in his will of his houses and property in the city of Sydney take estates in fee simple and not, as decided in the Court below, estates tail. It is undoubtedly true that an intention on the part of a testator to confer an estate in tail only may be gathered from an examination of the whole of the clauses contained in his will, but in deciding whether such an intention existed their Lordships are of opinion that the first thing to be considered is the language which the testator has used in making the gift upon which the question arises. In the present case the gift consists in a direction to the trustees to pay the rents of the property equally between his seven children—naming them—and his wife, with a superadded direction that his wife is to take for her life use only and that after her death her share is to revert back and be equally divided among his aforesaid children or their issue. A contrast

(1) [1900] A. C. 127.
(2) (1871) L. R. 7 Q. B. 116.
(3) (1861) 29 Beav. 657.
(4) [1913] 1 Ch. 552, at p. 560.
(5) (1879) L. R. 7 Ex. 339, at p. 358.
(6) [1897] A. C. 658.
(7) (1858) 6 H. L. C. 823.
(8) (1844) 1 Coll. 416.
(9) (1846) 15 Sim. 83.

is thus drawn between the children and the wife. The children's interest in the rents is not limited to their lives. The wife, on the other hand, takes only a life interest, with a gift over on her death to the children or their issue. The gift of the rents of a property for an undefined period prima facie carries the fee simple in the property, and a gift after a life interest to named persons or their issue prima facie gives the persons named an absolute interest with a substitutional gift to their issue in the event of any of them dying in the lifetime of the tenant for life leaving issue. Their Lordships conclude that under the gift in question the children of the testator take estates in fee simple. It was contended in argument that the words of the gift over of the wife's share were consistent with the children taking estates tail in their original shares and estates tail in remainder in the wife's share, and no doubt if it were clear from other parts of the will that the children took estates tail in their original shares it would be easy to read the gift over of the wife's share to them or their issue as equivalent to a gift over to them and their issue, but in their Lordships' opinion this fact cannot be used as an argument in favour of its having been the testator's intention to create estates tail. This intention must be found, if at all, in other parts of the will.

The clauses relied on to control the prima facie meaning of the words of gift are in effect two only. The testator directs (1.) that the property in question shall not be disposed of, mortgaged, or encumbered in any way whatsoever; and (2.) that the same shall remain in his family from time to time for ever. With regard to the first direction, it is quite possible that the testator imagined that the direction would be effectual whatever were the nature of the estates which he was limiting to his children, and in this connection it is to be noticed that as to the hereditaments which he refers to as his country property, and which are undoubtedly given to his children and wife in fee simple, he directs that the same are not to be disposed of without their mutual desire or agreement. With regard to the second direction, it is equally possible that the testator was thinking only of the result which would ensue if the first direction were observed. Further, with regard to the second direction, it is a

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direction that the property should remain in the testator's family and not in the families of the first takers, and the testator had another child by a former marriage. In those authorities in which importance has been attached to the use of the word "family" as pointing to an estate tail the family referred to has been that of the first taker.

Under these circumstances their Lordships are of opinion that neither of the directions relied on contains anything necessarily inconsistent with the prima facie meaning of the words of gift and that the appeal should therefore be allowed. They will humbly advise His Majesty to this effect, and in their opinion the respondents, other than those added by order of May 27, 1915, should pay the costs here and below.

Solicitors for appellants: *Kimber & Boatman.*

Solicitors for respondents: *Burn & Berridge, and Burton, Yeates & Hart.*

[PRIVY COUNCIL.]

J. C.* 1915 *June* 22 *July* 22.

ARTHUR JOHN PATE . . . . . APPELLANT;

AND

W. C. PATE AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Partnership—Verbal Agreement—Action for Accounts after Dissolution—Ordinance VII. of 1840, *s.* 21.

By Ceylon Ordinance VII. of 1840, s. 21, "no promise, contract, bargain, or agreement, unless it be in writing and signed by the party making the same, or by some person thereto lawfully authorized by him or her, shall be of force or avail in law for any of the following purposes: . . . . (4.) for establishing a partnership where the capital exceeds 100*l.*: provided that this shall not be construed to prevent third parties from suing partners, or persons acting as such, and offering in evidence circumstances to prove a partnership existing between such persons, or to exclude parol testimony concerning transactions by or the settlement of any account between partners."

The deceased respondent sued the appellant, and others, in Ceylon, alleging that a partnership agreement had been made between them in

* *Present:* LORD SUMNER, LORD WRENBURY, and SIR EDMUND BARTON.

1897, that the partnership business had been carried on till 1901, when the partnership had been dissolved, and that the appellant had since the dissolution carried on the business and retained the partnership assets; he claimed an account and payment. There was no agreement of partnership in writing:—

Held, that the suit could not be maintained in the absence of an agreement in writing.

D. C. Kandy, No. 52,568 (1871) Vanderstraaten, 195, and cases following that decision, overruled.

APPEAL from three orders of the Supreme Court (July 17, 1907, November 4, 1908, and December 19, 1911), the first allowing, the second dismissing, and the third varying three several orders of the District Court of Kandy.

C. H. Pate, deceased, represented by the respondents, instituted a suit against the appellant and others in the District Court of Kandy claiming a partnership account, payment of any sum found due, and other relief. He alleged that a partnership agreement had been made between himself and the defendants at the end of 1897 to carry on a coaching business in Ceylon, that there had been joint contributions of capital, that the partnership business had been carried on from early in 1898 until 1901, when it was dissolved, and that since the dissolution the assets had been retained and the business carried on by the appellant without any account being taken.

The appellant pleaded, inter alia, that there was no partnership agreement in writing and that, the partnership capital exceeding 100*l.*, the suit was not maintainable by reason of s. 21 of Ceylon Ordinance VII. of 1840. The material parts of the section appear from the head-note.

The District Judge held that the suit was maintainable although the partnership agreement was not in writing; he, however, dismissed the suit upon other grounds of fact and law not material to the present decision.

The Supreme Court (Middleton and Grenier JJ.), by its judgment delivered on July 17, 1907, allowed the appeal and made an order for accounts and inquiries. The learned judges disagreed with the District Judge upon the facts, but they were of opinion that he had rightly held that the suit was maintainable although there was no partnership agreement in writing.

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The further orders appealed from were made in subsequent proceedings in the suit and are not material to the decision of their Lordships.

Sir Erle Richards, K.C. (for *Norman Craig, K.C.*, serving with His Majesty's Forces), and *Van Breda*, for the appellant. In the absence of an agreement in writing the respondent cannot maintain the suit. Sect. 21 of Ordinance VII. of 1840 precludes any suit in which the plaintiff's right of action depends upon the existence of a partnership where the partnership capital exceeds 100*l.* unless the agreement is in writing. The proviso cannot be construed so as to enable an action for partnership accounts to be brought, for to do so would render the main provisions nugatory. The proviso is intended to save suits between partners where it is not necessary to prove the partnership, as for instance an action on an account stated. The section contains a clear statutory provision to which effect must be given even if the contract has been performed: *Young* v. *Leamington Corporation.* (1) The interpretation of the section has been the subject of many decisions in Ceylon. In the case known as *D. C. Kandy, No.* 52,568 (2) the Supreme Court in 1871 erroneously held that where a partnership had been carried out and was dissolved, a balance remaining in the hands of one partner, the proviso enabled a plaintiff to prove his case by parol evidence. This view was dissented from by Burnside C.J. in *Sawenna Chetty* v. *Kawenna Chetty.* (3) In subsequent decisions the Supreme Court has followed the decision of 1871 or has distinguished it. [*Bawa* v. *Mohamado Cassim* (4); *Mendis* v. *Peiris* (5); *Silva* v. *Nelson* (6); *Annamali Chetty* v. *Shand* (7); *Silva* v. *Silva* (8); *Kanappa Chetty* v. *Wallathappa Chetty* (9); *Singho Appu* v. *Amarasuriya* (10); and *D. C. (Final) Galle, No.* 9731 (11) were also referred to.]

P. O. Lawrence, K.C., Dornhorst, K.C., H. A. Hind (for *J. N.*

(1) (1883) 8 App. Cas. 517.
(2) (1871) Vanderstraaten, 195.
(3) (1884) 6 Sup. Ct. Circular, 119.
(4) (1891) 1 Ceylon L. R. 53.
(5) (1892) 1 Ceylon L. R. 98.
(6) (1898) 1 Browne, 75.
(7) (1900) 1 Browne, 37.
(8) (1902) 6 New L. R. 92.
(9) (1903) 7 New L. R. 339.
(10) (1908) 1 Weerekoon, 78.
(11) Sup. Ct., Nov. 4, 1910, unreported.

Buchanan, serving with His Majesty's Forces), and *Sproule*, for the respondents. Sect. 21, so far as it refers to partnerships, only precludes a suit upon an executory agreement; for instance it prevents a suit being maintainable for specific performance or for a declaration where a verbal partnership agreement has not been carried into effect. [*England* v. *Curling* (1) and Lindley on Partnership, ch. v., par. 1540, were referred to.] The section does not apply where the partnership transactions have been carried out and the partnership dissolved with a balance in the hands of one partner. To hold that it did so would render the section an instrument of fraud, and would give no reasonable effect to the last part of the proviso. The decision in *Young* v. *Leamington Corporation* (2) was based upon the peculiar position of municipal corporations; further, it does not affect the argument upon the proviso. The decision in the *Kandy Case* (3) has been recognized in Ceylon for a long period and should not now be disturbed. The application for leave to appeal to His Majesty in Council was out of time under Ceylon Ordinance XXXI. of 1909, Sched., rr. 1 and 2. This objection is not taken in the respondents' case, but should be enforced by the Board: *Karuppanam Servai* v. *Srinavasan Chetti*. (4)

Sir Erle Richards, K.C., in reply. Until it was ascertained under the final order whether the amount of the judgment was over Rs.5000 it was not clear whether or not there was an appeal as of right. In any case the Board has a discretion and should not enforce the objection.

1915 *July* 22.

The judgment of their Lordships was delivered by

Lord Sumner. From the beginning of 1898 Arthur John Pate, now appellant, Charles Henry Pate, whose legal personal representatives are now respondents to this appeal, and George William White and Charles McClay, both now dead and strangers to these proceedings, traded together in a coaching business between Matale and Jaffna and between Damboola and Trincomalee. They had no articles of partnership. There was no agreement in writing, or written memorandum of the bargain

(1) (1844) 8 Beav. 129.
(2) 8 App. Cas. 517.
(3) (1871) Vanderstraaten, 195.
(4) (1901) L. R. 29 Ind. Ap. 38.

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subsisting between them. Their capital exceeded 100*l*. Disputes presently arose, and there has been much controversy about them. In one way or another their partnership—for such de facto it was—had come to an end before December, 1903, when Charles Henry Pate began the present suit, making Arthur John Pate the principal defendant.

The plaint alleged that there was an agreement of partnership, carried out by contributions of capital and by joint trading, and alleged also its ultimate dissolution. It stated that no account had been taken or settled, and prayed a decree for partnership accounts, with payment of such sums as might be found due and other suitable relief.

The answer took the objection in limine that the partnership agreement was not proved by any writing in accordance with Ordinance VII. of 1840, s. 21. The action went to trial. It was held to be maintainable, and the ruling was sustained on appeal. This was in July, 1907. Inquiries were directed, and further proceedings and appeals took place till, in December, 1911, the Supreme Court disposed of the last of them, and judgment went against the now appellant for some Rs.40,000.

The respondents' counsel drew their Lordships' attention to the fact that the Supreme Court of Ceylon disposed of the objection based on Ordinance VII. of 1840 as long ago as 1907, while leave to appeal to their Lordships' Board was only granted in 1912. It was suggested that after such an interval of time their Lordships might well decline to entertain what was called a mere technical objection. The point had been argued when the Supreme Court granted leave to appeal, and the Court, following prior decisions in Ceylon, held that the decree, which declared the existence of a partnership, was not appealable till the taking of accounts had shown whether or not an amount of Rs.5000 or more was involved, as provided in r. 1 (*a*) of the Rules scheduled to Ordinance XXXI. of 1909. The appellant's case did not raise this point; and, as their Lordships are of opinion that it is not an objection of which their Lordships would take notice motu proprio, no further observation need be made upon it.

Ordinance XXII. of 1866 enacted that English law is the law

of partnership in Ceylon, but this in no way enlarged or diminished the prior Ordinance VII. of 1840. When that Ordinance has been construed, no Court can proceed to modify its effect or restrict its application.

It is described as an Ordinance to provide more effectually for the prevention of frauds and perjuries. Its object is effected by requiring certain kinds of transactions to be proved by writing, not by limiting the competency of persons, or by prohibiting or penalizing their acts, or by avoiding certain classes of transactions. After a code of formalities for the execution and attestation of wills and sundry deeds and other instruments in twenty sections, it proceeds in s. 21 to what is plainly an evidentiary provision with regard to certain legal proceedings. It enacts that "no . . . . agreement, unless it be in writing and signed by the party making the same . . . . shall be of force or avail in law for any of the following purposes." The first three purposes are: (1.) charging any one with another's debt or default, (2.) pledging movable property without delivery, and (3.) sale of movables without either delivery or some payment. The fourth is "for establishing a partnership where the capital exceeds one hundred pounds."

To this there is a proviso: "Provided that this shall not be construed to prevent third parties from suing partners, or persons acting as such, and offering in evidence circumstances to prove a partnership existing between such persons, or to exclude parol testimony concerning transactions by or the settlement of any account between partners."

But for the use of the word "establishing" as to the purpose, and of the word "prove" in the proviso, it could hardly be doubted that "establishing" means "establishing by proof" coram judice. The significance of a change of term as importing change of substance, though material, may easily be exaggerated. If at the end of the trial the judge had said to the plaintiff, "you cannot succeed unless you establish a partnership, and on the evidence you have established none," the mere expression would have been perfectly correct. In their Lordships' opinion the words "for establishing a partnership" clearly apply to the present case, which was founded on the allegation of an agreement,

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not expressed in any writing, of which parol evidence was adduced for the purpose of establishing a partnership as the basis of the suit. This agreement, in their opinion, was of no force, and did not avail in law unless it could be brought within the proviso. They are unable to accept the somewhat unpractical contention that "establishing" here specially refers to cases (if such there be) where the plaintiff seeks to establis his disputed right to be a partner, and not to cases where the parties have acted as if they were partners in fact and some dispute has arisen as to their partnership rights or property inter se.

It is true that the Ordinance says "no agreement shall be of force," and not "no evidence of an agreement shall be of force," but this appears to be a mere verbal distinction. In what sense could an agreement be of force for establishing a partnership which would effectually distinguish the agreement from the record or evidence of that agreement? It is said that a partnership which exists in fact, and a fortiori a partnership which has existed in fact and has been determined, needs no "establishing," a term only appropriate to that which exists exclusively in promise and not in performance. Again, this is only a play upon words. Partnership is essentially a relation resting in agreement. That agreement may be proved or established (if there be no evidentiary law to the contrary) by proof of an express agreement, written or unwritten, or by proof of such acting as raises the inference of an implied agreement, but a partnership, whether in course of performance or wholly spent, is still a matter of agreement, though of agreement coupled with something more. If agreement once be negatived, there is no partnership at all. However the matter may stand where an existing or past partnership is admitted, it is equally necessary to "establish" the agreement upon issue joined in that regard, whether the partnership alleged to be agreed is, or was, or is to be. The requirement is evidently a binding rule of evidence in Courts of law.

As all parties to the suit had been de facto partners, or were the legal personal representatives of such persons sued as such, only the last line of the proviso need be considered. The question is whether the present is a case of "parol testimony

concerning transactions by " partners, or concerning " the settlement of any account between partners."

Their Lordships think that the answer must be in the negative. Where the transaction of which proof is tendered would be irrelevant if it were not that it is a transaction by a partner, proof of it is testimony for establishing a partnership, and if that be not established the proof of the transaction is immaterial. If parol testimony can always be given concerning transactions by partners, it is not easy to see what the cases are in which a writing signed by the party is requisite. Again, if the settlement of any account between partners means simply a claim upon an account stated, it does not matter whether the parties to it have been partners or have not. If there is to be any relevancy in the words " between partners," it must be because claims for a partnership account, where the partnership is neither admitted nor established, are not within the proviso. Thus, just as a third party seeking to make A. and B. liable to him as partners may give circumstantial proof of their partnership, so, as soon as a partnership agreement has been duly established by writing, parol testimony of the partners' transactions and settlements of account may be given without further documentary evidence.

It may be that such an interpretation will restrict the application of the proviso to cases which are limited in extent and of infrequent occurrence. Still, on the whole, if the law requires certain classes of agreement to be recorded in or evidenced by writing in order to prevent fraud and perjury, the smaller the area of an exceptive proviso, the more emphatic is the safeguard against the commission of these offences. It is plain that the words " for establishing a partnership " refer to proof of a partnership generally, for otherwise the first branch of the proviso would not be an exceptive proviso at all, but a mere unnecessary warning. The first branch of the proviso refers to the case of strangers to a partnership who desire to prove its existence; the second deals with certain matters arising in proceedings between established partners.

It was urged upon their Lordships that, in accordance with a current of authority in Ceylon, now of considerable standing, a

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different interpretation should be placed on the words of this section. In 1871 it was decided in an anonymous case (*D. C. Kandy, No.* 52,568 (1)) that when a partnership had been terminated, and on balance of account one partner claimed a sum to be due to him from another, he might prove his claim by parol evidence under this proviso, as "well with regard to the fact that a partnership had existed as with regard to the balance due." The reason for this decision is not clear. The Court distinguishes such a case from one in which a partnership has to be "established," by describing the latter as a case "where a man seeks to compel another to act as his partner"—a description which is very obscure. This case has been followed in Ceylon ever since, often with expressed reluctance, and latterly always on the ground that the decision is binding. Thus, in *Sawenna Chetty* v. *Kawenna Chetty* in 1884 (2), Burnside C.J. expressed his doubts of it, and in *Bawa* v. *Mohamado Cassim* (3) Dias J. supports the case on a supposed distinction between executory contracts of partnership and contracts which have been partly executed. Later decisions treat the point as ruled by the case in Vanderstraaten, namely, *Mendis* v. *Peiris* (4), though Burnside C.J. dissented; *Silva* v. *Nelson* (5) and *Annamali Chetty* v. *Shand* (6); *Silva* v. *Silva* (7); *Kanappa Chetty* v. *Wallathappa Chetty* (8); *Singho Appu* v. *Amarasuriya* (9); and two later decisions, unreported, of which certified shorthand notes of the judgments were produced to their Lordships.

With all respect to the learned judges who so read the Ordinance in 1871, their Lordships not only think that their decision was erroneous, but also that even after the interval of forty-four years it ought to be overruled. The present is not one of those cases in which inveterate error is left undisturbed because titles and transactions have been founded on it which it would be unjust to disturb. There can be few partnerships in Ceylon, still in operation or unliquidated, in which writing has been dispensed with on the faith of these decisions. If parties choose to disregard

(1) (1871) Vanderstraaten, 195.
(2) 6 Sup. Ct. Circular, 119.
(3) 1 Ceylon L. R. 53.
(4) 1 Ceylon L. R. 98.
(5) 1 Browne, 75.
(6) 1 Browne, 37.
(7) 6 New L. R. 92; 3 Browne, 136.
(8) 7 New L. R. 339.
(9) 1 Weerekoon, 78.

so ordinary and so simple a formality as the Ordinance requires, there is no hardship in leaving them to take the consequences, nor is it in any case sound to misconstrue a statute for fear that in particular instances some hardship may result. That is a matter for the Legislature, not for the Courts. Whenever the law enacts that the truth shall be proved by one form of testimony only, and not by all admissible and available forms, there is peril of doing particular injustice for the sake of some general good, and even of enabling some rogue to cloak his fraud by taking advantage of a statutory prescription the policy of which was the prevention of fraud. This the Legislature must be taken to have weighed before enacting the Ordinance. All that remains for judicial determination is its true meaning.

This decision has made it unnecessary to pursue the issues of fact which were investigated by the Courts below. Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs here and below, and that judgment should be entered for the defendants in the action.

Solicitor for appellant: *O. A. Caley.*
Solicitors for respondents: *Clarke, Rawlins & Co.*

[PRIVY COUNCIL.]

J. C.*
1915
June 28;
July 1, 26.

THE KING . . . . . APPELLANT;

AND

CATHERINE LENA BROAD . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Government Railway—Negligence—Level Crossing—Rights of Public—By-law—Invalidity—Public Works Act, 1908 (*Consolidated Statutes of New Zealand*, 1908, *No.* 160), *s.* 191, *sub-s.* 2—*Government Railways Act*, 1908 (*Consolidated Statutes of New Zealand*, 1908, *No.* 74), *s.* 10 (*e*) (*ix.*), *and By-law No.* 38.

By the Public Works Act, 1908 (of New Zealand), s. 191, sub-s. 2, "where a road or street crosses a railway on a level the public right of way at such crossing shall cease whenever any engine or carriage on the railway is approaching and within a distance of half a mile from such crossing; and shall at all other times extend only to the right of crossing the line of railway with all convenient speed, but not to stopping or continuing thereon."

By by-law No. 38, made under the Government Railways Act, 1908 (of New Zealand), s. 10 (*e*), "no person shall drive, or attempt to drive, any vehicle or animal on any part of a public road, where the same crosses over or upon a railway on the same level, otherwise than at a walking pace, and every person shall, before crossing the lines of rail, comply with the directions upon the notice board 'stop; look out for the engine'":—

Held, (1.) that s. 191, sub-s. 1, above set out, suspended, during the period therein referred to, the absolute right of the public to pass along a highway over a level crossing, but left unaffected the right of those who did so pass to have reasonable care exercised by the railway authority in using the line; (2.) that by-law 38, above set out, was invalid for ambiguity, and was also ultra vires since it was not a reasonable exercise of the power under which it was made, that power being conferred only for the safety, convenience, and due management of the railway traffic.

APPEAL from a judgment of the Court of Appeal of New Zealand (August 4, 1914).

The respondent's husband while riding on a motor cycle along a public road in New Zealand, at a point where it was crossed

* *Present:* VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

upon the level by a Government railway line, was struck by an express train and received injuries from which he died.

The respondent presented a petition of right in the Supreme Court, alleging that the accident resulted from the negligence of the officers and servants of the Government, and claimed compensation, under the Crown Suits Act, 1908, s. 35 (*b*), and the Death by Accident Compensation Act, 1908, on behalf of herself and children.

The plea entered on behalf of the Crown denied negligence and pleaded that at the time of the accident the deceased was not lawfully using the level crossing; it was further pleaded that the deceased had been guilty of contributory negligence in not stopping and looking out for the train before attempting to cross the line. The petition was heard by Stout C.J. sitting with a jury. The following facts appeared from the evidence. The level crossing was situated at the bottom of a dip in the line and, owing to a cutting and a slight curve in the line and to bushes along the road, the view of the line from the road was considerably obstructed. The deceased crossed the line at a rapid pace and without stopping before doing so. The train being overdue, he had some reason for thinking that it had already passed the crossing. The whistle was sounded in accordance with the statutory regulation when the train was 300 to 400 yards from the crossing and for seven or eight seconds. The train was running at twenty-five miles an hour before reaching the crossing, the maximum speed allowed by regulation being thirty-five miles.

The appellant relied upon the Public Works Act, 1908, s. 191, sub-s. 2, and by-law No. 38, both of which are set out in the head-note, and upon the Government Railways Act, 1908, s. 25, which imposes a penalty upon any person driving a vehicle or animal across a level crossing when an engine is approaching and is within half a mile.

The jury inspected the site of the accident. By their verdict, given in answer to a series of questions left to them, they found, inter alia, that the construction of the crossing and the speed of the train together constituted negligence which caused the accident; that the regulation whistle was sounded but was

J. C. 1915 REX v. BROAD.

insufficient at the crossing; and that the deceased was not guilty of negligence which led to the accident. They awarded 2000*l.* compensation to the respondent.

The appellant subsequently moved for judgment or a nonsuit, alternatively for a new trial upon the ground of misdirection. The motions were moved into the Court of Appeal by consent and were heard together.

The Court of Appeal (Stout C.J. with Edwards, Cooper, and Stringer JJ., Denniston J. dissenting) delivered judgment in the respondent's favour. The majority of the learned judges were of opinion that the provisions of the Public Works Act, 1908, s. 191, and of the Government Railways Act, 1908, s. 25, did not render the deceased a trespasser upon the crossing, and that an attempt to cross the line when a train was approaching within half a mile was not conclusive evidence of negligence. They held that by-law 38 was unreasonable and void, and that there was evidence to support the findings of the jury. Denniston J. by his dissenting judgment was of opinion that the accident was due to the negligence of the deceased, and that the whistle and the speed of the train, being in accordance with statutory regulations, could not be found by the jury to constitute negligence on the part of the appellant.

Clavell Salter, *K.C.*, and *Northcote*, for the appellant. Having regard to the statutory provisions the respondent was a trespasser upon the level crossing, and the railway authority was there carrying on its authorized business. At best he was a mere licensee and only entitled not to be exposed to a trap. [Public Works Act, 1908, s. 190 (*b*), s. 191, sub-ss. 1, 2, 3; Government Railways Act, 1908, ss. 25 and 43; *Gautret* v. *Egerton* (1); *Burchell* v. *Hickisson* (2); *Batchelor* v. *Fortescue* (3); and *Norman* v. *Great Western Ry. Co.* (4) were referred to.] There was no evidence of anything amounting to a trap. Further, the respondent's contravention of by-law No. 38 was conclusive evidence of contributory negligence; that negligence was the sole cause of the accident. There was power under the

(1) (1867) L. R. 2 C. P. 371.
(2) (1880) 50 L. J. (Ch.) 101.
(3) (1883) 11 Q. B. D. 474.
(4) [1915] 1 K. B. 584.

Government Railways Act, 1908, s. 10, to make by-law No. 38; it is therefore not ultra vires even if unreasonable.

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Rayner Goddard, for the respondent. The statutory provisions relied on for the appellant do not affect the rights of persons who use the crossing when a train is within half a mile to have reasonable care taken by the railway authority. There was evidence to support the finding of the jury that the railway authority was negligent. The Government Railways Act, 1908, s. 10 (*e*), under which the by-law was made, authorized the making of by-laws for the purpose of regulating the railway traffic. By-law No. 38 interferes with the common law rights of the public and is not limited to circumstances in which it is necessary with regard to the railway traffic. It is therefore invalid: *Kruse* v. *Johnson*. (1) Even if the by-law is valid it was for the jury to find whether the effective cause of the accident was the negligence of the appellant or that of the respondent. There was evidence of negligence on the part of the railway authority amounting to a trap. [*Moore* v. *Ransome's Dock Committee* (2) and *Radley* v. *London and North Western Ry. Co.* (3) were also referred to.]

Northcote replied.

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The judgment of their Lordships was delivered by

Lord Sumner. This appeal raises two questions, first, whether there was evidence to support the jury's verdict of negligence on the part of the railway authority, and second, whether on the undisputed facts a verdict that the deceased met his death wholly or partly by his own default and not otherwise was not inevitable.

Apart from the effect of the Public Works Act, 1908, s. 191, sub-ss. 2 and 3, the position is this. The jury having visited the locus in quo, found, in terms which admit of no doubt, though they are not very precise, that, although the engine driver was not personally in fault, since he gave the whistle signal prescribed by regulation 117, there was negligence on the part of the railway authority, because a more effectual whistle and one better adapted to the particular level crossing ought to have

(1) [1898] 2 Q. B. 91. (2) (1898) 14 Times L. R. 539.
(3) (1876) 1 App. Cas. 754.

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been prescribed for this place. It was within the jury's competence to take this view. Whatever weight attaches to compliance with regular practice as evidence of the reasonableness of particular conduct on a given occasion, it was reduced to a minimum in this case by the fact that this regular practice was itself but compliance with a universal rule applicable to all level crossings at all times, no matter how various the circumstances might be. The power to make regulations, given by the Government Railways Act, 1900, and the Government Railways Department Classification Act, 1901, is a mere power, and there is no provision that compliance with regulations made thereunder shall be deemed to be sufficient care in all circumstances. Accordingly, the making of general regulations and the particular compliance with them still left those in charge of the working of the traffic bound to exercise whatever measure of care might in law be their appropriate duty upon the occasion in question.

In itself the position of the cyclist, Broad, on the one hand, and of the engine driver on the other, was that of persons using a highway in common, who come swiftly and unexpectedly upon one another at a point where, in a greater or less degree, each may expect to meet other persons and must therefore use reasonable care to announce his approach and to keep out of their way. The fact that one ran upon rails while the other used the ordinary road surface, and that one was only crossing the highway transversely instead of proceeding along it lengthwise, cannot make the position a different one in point of law.

Sect. 191, sub-s. 2, enacts as follows: "Where a road or street crosses a railway on a level, the public right of way at such crossing shall cease whenever any engine or carriage on the railway is approaching and within a distance of half a mile from such crossing; and shall at all other times extend only to the right of crossing the line of railway with all convenient speed, but not to stopping or continuing thereon." There can be no doubt that this section was framed with the intention of diminishing the rights of the public, and consequently the obligation of the railway authority, when a train is approaching within half a mile, but the right affected is not in

terms the right to have some appropriate measure of care observed by those directing the train. The right affected is the right of way, and the Legislature forbore, no doubt advisedly, to say that in such proximity to a train persons using the high road must cross at their peril and without any right to have any degree of care exercised towards them, while remaining under some duty to use care themselves in order to avoid injury to the train.

The language of the sub-section is amply satisfied by holding that on the specified approach of a train the public's absolute right to pass is suspended, leaving unaffected the question of other rights, if nevertheless persons do pass. Where a highway is crossed at right angles as of right priority of passage belongs to the first comer; he has a right to be on the crossing, and, so long as he is crossing with all convenient speed, the second comer cannot disregard or object to his presence, but must wait his turn if he cannot pass clear. Such a suspensory provision may be of considerable importance to the working of a railway; otherwise, for example, a flock of sheep might be driven on to the crossing as of right, when a train, though in sight and near at hand, could still pull up, and then the train would have to wait till the flock had crossed, with all convenient speed no doubt but far too slowly for the passengers' patience. There are many instances in which delay might be caused to trains at level crossings, which such a section as this tends to prevent, without inflicting real hardships on the public or imperilling its safety. The inconvenience is no more than is involved in waiting at level-crossing gates, when they are closed to road traffic on the approach of a train. The latter part of the section, which expresses the common law rule, is similar in its object, namely, the clearing of the road, so as to prevent the delay of a train. To use a colloquialism common in America, the train has "the right of way."

Whatever may have been the objects which the framers of this section had in mind, it ought not to be interpreted so as to bear hardly on public rights unless its language expresses such a diminution. The argument of counsel for the appellant contends for an extreme interpretation of the first part though the second is merely declaratory of the existing law. Without actually calling the deceased a trespasser, they claim the same immunities

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towards him as if he had tortiously entered upon private property of the railway authority instead of being a lawful user of a public highway. They argue that at most the obligation of the railway authority was not to lay a trap for him, and deny that there was any trap, since he saw and was familiar with the crossing, and could have seen the train if he had taken enough pains to do so.

Their Lordships have been unable to discover upon what legal foundation this construction rests. The surface of the level crossing is not vested in the railway authority. By s. 153 of the Municipal Corporations Act, 1908, the soil of the highway is, as such, vested in the municipal corporation of the borough, and that the crossing of the highway by a railway on the level does not divest the property in the soil at the crossing is shown by the contrast between sub-ss. 1 and 2 of s. 191, nor does s. 43 of the Government Railways Act, 1908, affect anything but the obligation to metal and maintain the surface of the crossing. Considerations which attach to trespass quare clausum fregit are inapplicable here.

The argument expressly assumed that the high road had been dedicated to the public before the railway was made. The case was put as one of occupation of premises, where, to the deceased's knowledge, the railway authority carried on a dangerous business, and his position and rights, if any, were likened to those of a person who, without leave or at most with bare leave, enters upon such premises and gets hurt thereon. Again, their Lordships think that occupation by the railway authority, which is the foundation of this argument, is not made out. The railway line is laid across the high road under such legal right that its presence on the surface of the highway is not, as it would otherwise be, a public nuisance, and so that no authority but the Legislature can require its removal. True also, by s. 43 of the same Act, the maintenance of the road at the level crossing has been for reasons of administrative convenience imposed on the minister instead of on the local authority having charge of the road. All this is far from such occupation as is the foundation of the principles applied both in *Gautret* v. *Egerton* (1) and in *Indermaur* v. *Dames*. (2)

(1) L. R. 2 C. P. 371.

(2) (1867) L. R. 2 C. P. 311.

Where premises are in private and exclusive occupation and the party injured has entered under circumstances which show that he knew that he was entering, not as of right but either wrongfully or upon terms, it is intelligible that the law should be strict as to the duty of the occupier and the risk of the visitor if he is injured by some source of danger which is patent and manifest. It is intelligible that the law should be stricter still to a person who comes not only without right, but without consent and wrongfully. In such case the party injured knows where he stands. In the present case the most that can be said is that the level crossing is for most part of the day and night in the occupation of neither party, and long stretches of time, when it is simply a somewhat inconvenient section of a high road, are with little, if any, warning diversified by flashes of statutory occupation as transient as they are sudden. To such a case, when the passer-by may be quite unable to tell whether his status is, on the appellant's construction of the sub-section, that of public right or private wrong or precarious toleration, it seems to their Lordships that it would be unreasonable to apply rules which belong to totally different cases. The argument would apply the limited duty of care incidental to exclusive occupation to the peculiar position created by a sub-section which does not name or imply occupation of any kind. On the contrary, the sub-section appears to be concerned with conflicting priorities of passage between persons actually using a public highway, and not with questions of mutual care between persons using it in equal right though in highly dissimilar circumstances. It may be that the railway authority has a rateable occupation of the railway track, but their Lordships are unable to regard this as a relevant matter. The fact is that members of the public have just as good a right, and in principle the same species of right, to the use of the roadway at the level crossing as the railway authority has, except in so far as a modification is introduced by s. 191 on the approach of a train. This modification is at all times a passing one; in many places it operates only at long intervals and for the briefest time.

The sub-section contains no provision requiring the railway authority to inform the wayfaring public of the precise proximity

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or even of the presence of the train. It appears to apply whether or not the passer-by does or can know of it. The shape of the ground, the curve of the line, the position of trees or houses, the occurrence of fog, snow, or darkness, all or any of these things may effectually screen the train's approach from the most wary; yet it seems they must discern or divine its approach for themselves, and decide as best they can whether it approaches in order to cross or only with the intention of stopping short and shunting back again. Upon these things their rights, it appears, depend; if the train is somewhere within the distance of half a mile, driven with the intention of approaching and crossing the road, then the crossing is in the exclusive occupation of the railway authority and the public come perilously near to trespass. They must draw the line for themselves between a wrongful and hazardous crossing and a crossing as of full right by their judgment of the distance of a possibly invisible train and of the practice of engine drivers at a spot they may never have seen before. These are cogent reasons for thinking that the sub-section was framed alio intuitu. Their Lordships think that so rigorous a ruling is more than should be extracted by bare interpretation from a sub-section which does not appear to be concerned at all with the conduct of persons who meet de facto upon a public highway, and they agree with the judgment of the majority of the Supreme Court of New Zealand, that s. 191, sub-s. 2, is no answer to the finding of the jury that the railway authority was guilty of negligence causing the death of Broad.

The second question turns upon the validity and effect of Railway By-law No. 38. Apart from this by-law, the evidence clearly raised an issue as to contributory negligence, on which the jury might find one way or the other. It is true that Broad approached a blind corner at the level crossing at a speed of some fifteen miles an hour along a road where, according to evidence which the jury must be taken to have accepted in finding negligence against the railway authority, the height of the hedge on the near side prevented the rider of a motor cycle from seeing an approaching train till he was too close to the crossing to pull up for it. On the other hand, there was evidence that would justify the jury in finding that Broad had reason to

believe that the only train which could obstruct his passage had passed. True, the stationmaster said that the train started six minutes late, and said, "On Wednesday she is always six minutes late," the day of the accident being a Wednesday, but it was for the jury to judge of his truthfulness and to estimate exactly what he meant. They clearly did not believe his evidence about the visibility of an approaching train from any point on the road. They may equally have disbelieved his story of the punctual unpunctuality of this train once a week, or, as the Supreme Court thought, have taken it to be "a mere general assertion, and not to be evidence of an established and recognized practice." In these circumstances, on the facts proved and apart from the by-law, it was for the jury to say whether there was contributory negligence on Broad's part or not, and if they thought that he reasonably believed, as a resident daily using the crossing, that the train had already passed, their verdict that he was not "guilty of negligence that led to the collision" must stand, since, as is not now disputed, they were fully and correctly directed on the point by the learned Chief Justice, who tried the case.

Accordingly, this matter turns on the effect of the by-law. It may be noticed that in the pleading only that part of the by-law was relied on which affected Broad's speed at the crossing; the contention that, under the by-law, he ought to have stopped at the crossing does not appear till the motion for judgment was made at the end of the plaintiff's case.

The by-law in question was made in exercise of the power given by s. 10 (*e*) (ix.) of the Government Railways Act, 1908, which enables the Minister of Railways to make by-laws in respect of railways or of any specified railway or any part thereof, "regulating the public or private traffic of persons, vehicles, or goods on roads that cross any railway on the level thereof." Further, by s. 11 (*d*) it is provided that "any by-law may apply to railways generally or to any particular railway or part of a railway."

The by-law is in the following terms:—"No person shall drive or attempt to drive any vehicle or animal on any part of a public road, where the same crosses over or upon a railway on the same level, otherwise than at a walking pace, and every person shall,

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before crossing the lines of rail, comply with the directions upon the notice-boards, 'Stop; look out for the engine.'"

This is by-law No. 38; the next, No. 39, deals with private roads crossing a railway on the level and in this connection merely requires that "every person before attempting to enter or to drive any vehicle or animal thereon shall first ascertain that no approaching train is within half a mile."

Finally, by-law No. 62 punishes any breach of any of these by-laws by a penalty not exceeding 10*l.* for each such breach, though if the offender is not a member of the public, but employed about the railway, the maximum penalty in his case is 1*l.* only.

Upon the facts of the case it can hardly be doubted that, if Broad had come to a standstill at the level crossing and had looked up the line, while still clear of the rails, he must have seen the approaching train and would have gone scathless. If it was his legal duty to have "stopped" in this sense, and if, by voluntarily going on without stopping, he met his death, he would be no less the author of his own injury than if his breach of duty had been breach of a common-law duty to do whatever was reasonably careful and not breach of a prescribed duty to do a particular thing. What then does this by-law enjoin and what is its validity and force in law?

In its terms the by-law is of general application; it is not, as it might have been, specially framed to suit this spot. The photographs, which were proved in evidence, showed that the notice-board at the crossing in question, and, as their Lordships were informed, at level crossings in New Zealand generally, was of the following description. On the offside of the road to those approaching the crossing in each direction a tall pole is erected. It has on its top a board bearing the word "Stop" in large letters, and some feet below, about the middle of the post, a smaller board bearing, in smaller letters, "Look out for the engine." This, or one of these, is the notice-board with the "directions" of which the passer-by is required to comply in terms of the by-law.

Since this by-law is of universal application, and since, as it appears, level crossings are the rule in New Zealand, it is quite plain that if it requires all passers-by to stop—that is come to a

standstill—and in that posture to look out for the engine at every level crossing and then go on, using, of course, the same proper care as would have been incumbent without any by-law, it must in a multitude of cases require persons who lawfully use the highway to go through an idle and irritating ritual on pain of an accumulation of convictions and a burden of penalties, which only the good sense and clemency of justices can save from being crushing. The whole Supreme Court (for on this part of the case Denniston J. expressed no dissent), with a plenitude of local knowledge which has much assisted their Lordships, seem to have recognized fully the grave public inconvenience that such a requirement must occasion. Many level crossings, it seems, are so constructed that coming to a stand and then crossing at a walking pace creates a danger otherwise avoidable, for if the approaching train be invisible and the road on the other side ascends from the line of rails, there is every chance for a train to appear at close quarters while a motor car or a waggon is being got into motion again and is slowly proceeding uphill clear of the metals. If, on the other hand, the view is clear for miles and either no train is in sight or none within a distance which can be traversed in less than several minutes, to what purpose is this waste of time and energy? If the passenger knows that no train is due for hours, or that no train can approach, since he has just seen a train pass on a single line in the other direction, which he knows cannot reach a siding for several minutes, what is the point of requiring him to halt on the edge of the rails? If the conduct of the railway servants has reasonably led him to believe that the line is clear, again, why must he arrest his progress? Why is the immutable formality of stopping imposed in the case of a public road, when in the case of a private road it is enough to attend to the practical point and "first ascertain that no approaching train is within half a mile"?

If this act of stopping is made of universal obligation it might, at any rate, have been expected that language would have been employed of quite unambiguous meaning. The requirement is not to stop, but to comply with the directions upon a notice-board, which, moreover, the by-laws do not require any one to erect or maintain. According to the experience of the Supreme

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Court the public in New Zealand does not stop at every level crossing and indeed rarely stops at all, probably only when it is reasonably needful. This must not be attributed to a universal contumacy, which, indeed, could have no legal effect, or to a general clemency on the part of prosecuting authorities which would probably be a dereliction of their duty, but to a general opinion, right or wrong, that the directions are "complied with," if the engine is "looked out for," where there is not reasonable ground for believing that there is no engine to be seen, however long it be looked for. Whether, as a matter of interpretation, this be right or wrong, it is at least ground for saying that in the minds of those most concerned this by-law does not bear the interpretation contended for by counsel for the appellant, and that is proof that the by-law fails by reason of its ambiguity to give adequate information as to the duties of those who are to obey it: *Nash* v. *Finlay*. (1)

Again, it is clear from the terms in which the power to make by-laws is conferred that the object of the by-laws, and therefore the limit of the power, is the safety, convenience, and due management of the railway traffic. Where that is not and cannot be affected the Minister of Railways has no concern with traffic on the roads. To what purpose then are members of the public required to come to a stand, except when trains are or presently may be approaching so that if the line be crossed before they have passed a collision may occur or the train be delayed?

Their Lordships, of course, cannot revise this by-law merely because they possibly would not have made it, if they had been invested with what is the function of the Minister of Railways alone. The rule is well established that if by-laws "involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say—'Parliament never intended to give authority to make such rules'": per Lord Russell of Killowen C.J. in *Kruse* v. *Johnson*. (2) Furthermore, in the present case, on the evidence given and the view which the jury took of it, the conduct of the servants of the

(1) (1901) 85 L. T. 682. (2) [1898] 2 Q. B. 91, at p. 99.

railway authority itself led Broad to believe that no train was or could be approaching, and he was prevented from knowing the truth by the want of adequate signals in view of the configuration of the ground. Can it be said that a by-law, which made him liable to conviction for acting in accordance with that belief, and thereby disregarding a useless and cumbersome ceremony, was an exercise of a power of regulating public traffic on the road for the protection of the railway? The answer to such questions must be "No."

On all these grounds their Lordships agree with the judgment appealed from, and think that the by-law cannot be sustained.

The view thus arrived at makes it unnecessary to deal either with the effect of ss. 25 and 43 of the Government Railways Act, 1908, or with s. 10 of the Government Railways Amendment Act, 1913. The terms of s. 25 limit its effect to the creation of a liability to be fined, and the minister's obligation as to metalling the road was, for the purposes of this case, only relied on as an alternative head of negligence on the part of the railway authority.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Mackrell, Maton, Godlee & Quincey.*
Solicitors for respondent: *Peacock & Goddard.*

[PRIVY COUNCIL.]

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CANADIAN PACIFIC RAILWAY COMPANY . APPELLANTS;

AND

McDONALD . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH (APPEAL SIDE) FOR THE PROVINCE OF QUEBEC.

Canada (Quebec)— Workmen's Compensation—Rent recoverable—Limitation of Capital—R. S. Q., 1909, arts. 7322 and 7329.

The amount of rent (or annuity) which an injured person can recover from his employer under the Workmen's Compensation Act, 1909, of the Province of Quebec (now R. S. Q., 1909, arts. 7321 et seq.) is that provided by art. 7322 (1.), and is not limited by art. 7322 (2.) to the rent represented by a capital sum of $2000; the limitation in art. 7322 (2.) only applies where the person injured, or his representatives, exercise the option given by art. 7329 to have the capital of the rent paid to an insurance company.

APPEAL, by special leave, from two judgments of the Court of King's Bench (Appeal side) for the Province of Quebec (October 31, 1912, and October 30, 1913), the first reversing an order of Charbonneau J. and the second affirming the judgment of Fortin J.

The respondent having suffered serious injuries in the course of his employment petitioned under R. S. Q., art. 7347 (being part of the Workmen's Compensation Act, 1909), for leave to enter a suit to recover against the appellants, his employers, $450, being half the total of his earnings for one year from the date of the accident, and the sum of $337.50 per annum thereafter as being half the amount by which his wage-earning capacity had been reduced. The appellants admitted their liability to compensate the respondent, but contended that the amount of compensation recoverable by him was limited by art. 7322 (2.) to the rent represented by $2000.

The petition was heard by Charbonneau J. in the Superior Court for the Province of Quebec; the learned judge agreed with this contention and ordered that effect should be given to the

* *Present:* VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

appellants' offer to confess judgment for the rent represented by $2000.

The Court of King's Bench (Appeal side), consisting of Archambeault C.J. with Lavergne, Cross, Carroll, and Gervais JJ., reversed this order and gave the respondent leave to enter a suit for the amount claimed. The Supreme Court of Canada dismissed an appeal upon the ground that the order of Charbonneau J. was not final and that the Supreme Court consequently had not jurisdiction.

The suit was heard by Fortin J., who, considering himself bound by the judgment of the Court of King's Bench, gave judgment awarding the respondent a life rent of $247.50 per annum. This judgment was affirmed by the Court of King's Bench, consisting of the learned judges above named. The appellants appealed to the Supreme Court. That Court (Sir C. Fitzpatrick C.J. with Davies, Idington, Duff, Anglin, and Brodeur JJ.) dismissed the appeal, holding that the Supreme Court had no jurisdiction since the rental claimed was not of the appealable value and the amount of the capital represented by the rent could not be taken into consideration in deciding what was the amount involved.

The Court of King's Bench refused leave to appeal to His Majesty in Council on the ground that that Court was no longer seised of the matter and on the ground that the amount at issue was not of the appealable value under s. 68 of the Code of Civil Procedure of Lower Canada.

Special leave to appeal was granted conditionally.

Sir R. Finlay, K.C., *F. E. Meredith, K.C.*, and *Hon. M. M. Macnaghten* (for *Geoffrey Lawrence*, serving with His Majesty's Forces), for the appellants. The qualification in art. 7322 (2.) limits the rent payable in all cases except where there has been inexcusable fault on the part of the employer, and does not apply only to the case where the option given by art. 7329 is exercised. If the limitation were intended to apply only in the latter case it would form part of or follow art. 7329. It cannot have been intended that the exercise of the option should place the workman in a worse position than if he took the rent to which he was entitled under art. 7322 (1.). The Court of

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King's Bench followed its previous decision in *Grand Trunk Ry. Co.* v. *McDonell* (1); that decision was erroneous. [R. S. Q., 1909, arts. 7323, 7325, 7330, 7346, 7347, and Civil Code of Lower Canada, art. 1787, were also referred to.]

E. E. Vipond, K.C., for the respondent, was not called upon.

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July 22.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The question which their Lordships have to decide arises as follows. The respondent was a railwayman employed by the appellants. He suffered serious injury in an accident, the result of which was that he was partially but permanently incapacitated. He claimed that this entitled him to compensation under the Workmen's Compensation Act of the Province of Quebec, to the extent of a rent or annuity for his life of $337.50, being half of the amount by which his earning capacity had been reduced by the injury. The appellants did not dispute the title to compensation on this basis, but contended that under art. 7322, sub-head 2, of the Act the amount of the rent that could be claimed could not exceed the annual rent procurable with a capital sum of $2000. The only question to be decided is one of construction of the statute.

Art. 7322 provides in sub-head 1 that in cases to which the section applies the person injured is to be entitled in case of absolute and permanent incapacity to a rent equal to half his yearly wages, and in case of permanent and partial incapacity to a rent equal to half the sum by which his wages have been reduced in consequence of the accident. Sub-head 2 of the same article provides that "the capital of the rents shall not however in any case, except in the case mentioned in article 7325, exceed $2000." Under that article the Court may reduce the compensation if the accident was due to the inexcusable fault of the workman, or increase it if the accident was due to the inexcusable fault of the employers. Under art. 7329, after the amount of the compensation has been agreed or after judgment ordering it to be paid, the employer is to pay the amount of the compensation to the person injured or his representatives, "or, as the case may be and at the option of the person injured or his

(1) (1912) Quebec L. R. 21 K. B. 532.

representatives, shall pay the capital of the rent to an insurance company designated for that purpose by Order in Council."

Their Lordships are of opinion that the article last quoted interprets the reference to capital in sub-head 2 of art. 7322, and that this sub-head cannot properly be read as applying to any other case than that in which the injured person or his representatives demand that the capital, by which they understand to be meant the capitalized value of the rent, shall be paid over to an approved insurance company which will provide an annuity in lieu thereof. They observe that in sub-head 2 of art. 7322 the limitation is expressed to refer only to the capital of the rents described, and that no reference to this capital occurs elsewhere in the article. To read the words as governing the amount of the rent where it is claimed from the employer himself, instead of the amount to be paid to an insurance company for providing an annuity in lieu thereof, would be to introduce extraordinary results. An old man with a short expectation of life would obtain a larger compensation than a younger man. The latter, though equally incapacitated, might have been earning higher wages than the former. Yet on the construction of the Act contended for by the appellants he would get a smaller annuity from the insurance company by reason of his longer expectation of life. But it is natural that the Act should give the claimant the option of having what will often prove the better security of the obligation of the approved insurance company. Their Lordships think that the meaning of sub-head 2 is that if the claimant exercises this option the capital sum which he can compel the employer to find, and, it may be, to withdraw from his business, is to be limited. The sub-head would have been introduced by the draftsman more naturally after art. 7329. But their Lordships do not find in the place in the Act where the words have been introduced any sufficient reason for construing them otherwise than according to what appears to be their natural meaning, and as they have been construed by the majority of the learned judges in the Courts of Quebec both in the present case and in *Grand Trunk Ry. Co.* v. *McDonell.* (1) They concur in the view that the expression "capital of the

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rents" in sub-head 2 of art. 7322 derives its meaning as there used from the subsequent art. 7329. If so, it is only at the option of the claimant that the capital demand can be made to which the limitation applies. It may or may not suit him, having regard to his age and his estimate of his security for his rent, to exercise the option. The injured man may think it wisest to avoid the risk of proceedings to revise the amount of the compensation on the ground of diminution of the disability, under art. 7346, which provides for such revision, by changing the rent into an annuity purchased from an insurance company. To enable him to secure these advantages it was natural that the Legislature should give him an option, and no less natural that the amount of capital he could call for in connection with them should be limited. It is, however, far from being obvious why the words should have been introduced at all if they are to bear the construction for which the appellants contend, and are to restrict, not only the amount in case of exercise of the option, but the rent itself, in such a fashion that a man earning high wages would get no more compensation for being incapacitated from earning than a man earning much less. Their Lordships are of opinion that the language employed is not such as would naturally have been relied on if the intention had been to produce so remarkable a result.

They will therefore humbly advise His Majesty that the appeal should be dismissed with costs, to be taxed as between solicitor and client according to the conditions prescribed by the Order in Council giving leave to appeal.

Solicitors for appellants: *Paines, Blyth & Huxtable.*
Solicitors for respondent: *Blake & Redden.*